

Page 58

1 the stay, and get going again. If they say yes,
 2 then it goes on.
 3 So under the circumstances where the parties
 4 are agreeing, not happily, but agreeing that a full
 5 stay happens, then that's what we will do, which
 6 includes all discovery, including what we have all
 7 been just talking about.
 8 So everything would get stayed, and it goes
 9 up on appeal so nobody is spending money on a case
 10 that may turn out to be significantly different
 11 than what the plaintiffs are hoping it is now. Or
 12 either way, because it may be you won't want that
 13 discovery if it turns out you have a smaller case.
 14 Who knows?
 15 So we will stop everything. My orders that
 16 I issued, I will sign an order to that effect. It
 17 will be my order on the case. But further work on
 18 it is stayed.
 19 MR. BAILEY: Your Honor, to be real clear,
 20 the 10-day rule for the submission of a complaint
 21 that comports with the order that strikes the
 22 various claims that we have, that is stayed. We
 23 don't have to amend our complaint at this time, but
 24 we will do everything after we start back up.
 25 THE COURT: The entire case is stayed.

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1 Parties are free to do things that the Court
 2 doesn't get involved in, as long as they are
 3 appropriate and ethical.
 4 Obviously, I retain such jurisdiction over
 5 the case as to protect the integrity of the class
 6 action, but no work is to be done on the case
 7 unless there's some sort of emergency.
 8 That will get rid of your trial date, as
 9 well. You won't need to talk to Judge Koch,
 10 because I am staying the case.
 11 MR. BAILEY: Do we need to talk to him?
 12 THE COURT: I will let them know. I will
 13 let his staff know that this trial date should be
 14 taken off, because the case has been stayed. But
 15 the order might take a while before we get it
 16 issued.
 17 So I want the order to set out -- or to send
 18 me a proposed order or two that sets out exactly
 19 the issues to be certified. Because it's really, I
 20 think -- I can't remember. Is it the decision that
 21 is certified, or the issue that is certified?
 22 MR. BAILEY: The issue.
 23 THE COURT: So it doesn't have to be in the
 24 prior order. We don't have to give them the order.
 25 So meanwhile, I want to get that other order

Page 60

1 signed. And I think that covers it.
 2 Well, you will all be talking to each other
 3 through the Court of Appeals after we get these
 4 orders done. My guess is it's going to take a
 5 while even to get an answer from them as to whether
 6 they are willing to accept it, and we'll take it
 7 from there.
 8 MR. BAILEY: Thank you.
 9 MS. TIFT: Thank you.
 10 THE COURT: Thank you.
 11 ENDING TIME: 10:05 A.M.
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Page 61

1 STATE OF OREGON)
 2) ss.
 3 COUNTY OF YAMHILL)
 4 I, Deborah L. Cook, RPR, a Certified Shorthand
 5 Reporter, CSR in and for the State of Oregon and
 6 Washington, hereby certify that at said time and place
 7 I reported in stenotype all testimony adduced and
 8 other oral proceedings had in the foregoing hearing
 9 from audio recording; that thereafter my notes were
 10 transcribed via computer-aided transcription by me
 11 personally; and that the foregoing transcript
 12 contains, to the best of my ability based on the sound
 13 quality of said audio recording, a true and correct
 14 record of such testimony adduced and other oral
 15 proceedings had and of the whole thereof.
 16 Witness my hand and seal at Dundee, Oregon,
 17 this 1st day of February, 2006.
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 25

DEBORAH L. COOK, RPR
 Certified Shorthand Reporter
 OREGON CSR #04-0389
 CALIFORNIA CSR #12886
 WASHINGTON CSR #2992

16 (Pages 58 to 61)

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Exhibit



IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE, INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DEFENDANT AUTOZONE, INC.'S REPLY
MEMORANDUM IN SUPPORT OF ITS
MOTION TO CONSOLIDATE AND STAY
PROCEEDINGS**

Defendant AutoZone, Inc. ("AutoZone") respectfully submits the following Reply Memorandum in Support of its Motion to Consolidate and Stay. This Reply Memorandum is supported by the accompanying Declaration of Neil N. Olsen ("Olsen Declaration") and the pleadings and papers herein.

Notwithstanding Plaintiff's attempted arguments to the contrary, this action is ripe for stay and consolidation or coordination with *Joarnt v. AutoZone, Inc.* ("Joarnt"). In fact, Plaintiff's Response, at its core, supports the argument that this action and *Joarnt* are intimately intertwined. In light of this, and because Judge Kantor stayed *Joarnt* pending the outcome of the *Joarnt* plaintiffs' appeal of the dismissal of their meal and rest period claims (claims present in this action), this Court,

1 pursuant to its inherent authority to regulate its own docket and determine the fairest course for the
 2 parties, should completely stay this action pending resolution of the *Joarnt* appeal, and upon such
 3 resolution, consolidate the actions for discovery and trial.

4 **I. PLAINTIFF'S RESPONSE SUPPORTS STAY AND CONSOLIDATION**

5 Boiled down to its core, Plaintiff's Response contends that some claims in the Migis lawsuit
 6 are slightly different from those asserted in *Joarnt*—relating to different, but overlapping periods of
 7 time—but that the main difference, the one that should drive the Court's decision making in his
 8 favor, is the fact Migis alleges the same meal and rest period claims that are currently on appeal in
 9 *Joarnt*. This alleged "difference" is actually the similarity that most strongly counsels in favor of
 10 staying this action. To allow Plaintiff to continue prosecuting this action, included with it claims
 11 identical to those on appeal in *Joarnt*, would expose the litigants and the Court to the real possibility
 12 of spending substantial time and money on issues that are currently being appealed by Plaintiff's
 13 counsel—before that appeal has run its course.

14 Both the Plaintiff's attorney¹ and Judge Kantor recognized this fact in implementing the stay
 15 in *Joarnt* when its meal and rest period claims went up on appeal. Plaintiff's counsel noted that with
 16 the then prospect of meal and rest period claims on appeal, "it seems reasonably prudent not to try
 17 the case on the remaining matters only to have to redo it two years from now if, in fact—or a year
 18 from now, whatever the Court of Appeals actually rules, when we a get a ruling on this issue." See
 19 Olsen Decl, Ex. 1 at 14. Judge Kantor noted that with the meal and rest period claims going up on
 20 appeal, "everything would get stayed, and it goes up on appeal *so nobody is spending money on a*
 21 *case that may turn out to be significantly different from what the plaintiffs are hoping it is now.*"

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 26 ¹ As has been previously noted, Plaintiff's counsel also serves as counsel for the *Joarnt* plaintiffs.

1 *See id.*, Ex. 1 at 16 (emphasis added). If a stay made sense to Judge Kantor and counsel then, it
 2 should, and does, make sense now.

3 Plaintiff's reliance on *Gafur v. Legacy Good Samaritan Hospital & Medical Center*, 213 Or
 4 App 343 (2007), *rev. granted*, 343 Or 467 (2007), is misplaced. First, the Court of Appeals in *Gafur*
 5 allowed the plaintiff to assert a private right of action for missed rest period wages, but not for
 6 missed meal breaks. Specifically, the court held that "defendants' violation of the meal break rule,
 7 as that violation was alleged in this case, does not give plaintiffs a private right of action, but
 8 violation of the rest break rule does." *Id.* at 345. Thus, the Court of Appeals in *Gafur* did not, as
 9 Plaintiff argues in his Response, rule "that there is a private right of action for missed rest periods
 10 and wages due for improper lunch breaks."² *See* Pls. Resp. at 3. Second, the *Gafur* decision, based
 11 on a Rule 21 motion, makes clear that the court was driven by the specific allegations of the *Gafur*
 12 plaintiff. Therefore, what passes in the *Gafur* complaint does not necessarily pass here. A better
 13 measure here would be the *Joarnt* allegations, which, as set forth in previous briefing, are virtually
 14 identical, and which are currently at the Court of Appeals for review.

15 In sum, Plaintiff's own argument—that his claims differ from the currently stayed *Joarnt*
 16 claims because he includes claims identical to those on appeal in *Joarnt*—supports AutoZone's
 17 motion. Allowing Plaintiff's claims to go forward without the benefit of final adjudication of the
 18 *Joarnt* appeal would provide for the distinct possibility of severe inefficiency for the litigants and the
 19 judicial system. As argued more fully below, the Court should stay this action pending the outcome
 20 of the *Joarnt* appeal and then consolidate or coordinate the nearly identical actions.

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 22
 23
 24
 25 ² In any event, the factual posture of *Joarnt* was that employees, on occasion, did not have a full
 26 thirty minute lunch period—but it was clear that when they returned to work and because of
 AutoZone's electronic timekeeping processes, they were on the clock.

1 **II. THE COURT SHOULD COMPLETELY STAY THIS ACTION PENDING**
 2 **RESOLUTION OF THE JOARNT APPEAL, AND UPON SUCH RESOLUTION,**
 3 **CONSOLIDATE OR COORDINATE THE ACTIONS FOR DISCOVERY AND**
 4 **TRIAL**

5 Whether the Court eventually consolidates under ORCP 53 or coordinates under ORCP 32L,
 6 AutoZone moved for a stay of this action, the Court has the power to grant a stay, and it should—for
 7 the sake of judicial economy and consistency of judgments—stay this action pending the outcome of
 8 the *Joarnt* appeal. Furthermore, despite Plaintiff's attempt to downplay the effect of Judge Kantor's
 9 stay in *Joarnt*, see Pls. Resp. at 7 n.6, a complete stay of this action would prevent what appears to
 10 be an attempted end run around Judge Kantor's stay of the nearly identical *Joarnt* action pending
 11 outcome of the appeal.

12 The power to stay this action pending the outcome of the appeal in *Joarnt* is well within the
 13 power of this Court. As has been recognized by the Ninth Circuit:

14 A trial court may, with propriety, find it is efficient for its own docket and the fairest
 15 course for the parties to enter a stay of an action before it, pending resolution of
 16 independent proceedings which bear upon the case. This rule applies whether the
 17 separate proceedings are judicial, administrative, or arbitral in character, and does not
 require that the issues in such proceedings are necessarily controlling of the action
 before the court.

18 *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F2d 1458, 1465 (9th Cir 1983) (quoting *Leyva*
 19 *v. Certified Grocers of Cal., Ltd.*, 593 F2d 857, 863n-64 (9th Cir 1979), *cert. denied*, 444 US 827
 20 (1979), which in turn cited *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 US 180 (1952)).

21 While this is not controlling authority, it should speak persuasively to the power of American trial
 22 courts, in general, and this Court, specifically.

23 A stay of this action pending the outcome of the *Joarnt* appeal is the most efficient and fair
 24 way to proceed. Plaintiff failed to rebut in any way AutoZone's arguments regarding judicial
 25
 26

1 efficiency and the avoidance of conflicting judgments because there is no sound opposition to them
 2 in these circumstances. As it does not make sense from judicial efficiency or consistency of
 3 judgments perspectives to allow *Joarnt* to move forward while two of its main claims are on appeal,
 4 it does not make sense to allow nearly identical claims in this case to move forward pending the
 5 outcome of the *Joarnt* appeal, which could dramatically alter the landscape of the litigation. To
 6 allow otherwise would be to ignore the significant time and expense borne by the Court and the
 7 litigants in this type of action. Discovery and trial should occur only once if at all possible.

9 Plaintiff's claimed prejudice resulting from a stay does not withstand scrutiny. First, Plaintiff
 10 is mistaken in its reliance upon *United States Parole Commission v. Geraghty*, 445 US 388, 402n-04
 11 (1980), and *Schwendeman v. USAA Casualty Insurance Co.*, 116 Wn App 9, 17 n13 (2003), for the
 12 proposition that Plaintiff's right to pursue class certification somehow trumps the Court's power to
 13 stay an action in the interests of judicial efficiency and fairness. Both *Geraghty* and *Schwendeman*
 14 addressed the mootness doctrine, specifically, whether a class representative could continue to
 15 pursue claims on behalf of the class if his or her personal standing ceased to exist. Neither case is
 16 instructive for the current question. Second, Plaintiff's contention that "[s]hould he be forced to wait
 17 until *Joarnt* is dislodged from the Court of Appeals, [he] will have no way of obtaining discovery,"
 18 see Pls. Resp. at 8, is without basis. AutoZone has and will continue to comply with any existing
 19 obligation to preserve evidence.

22 **III. PLAINTIFF'S OTHER ARGUMENTS ARE WITHOUT MERIT**

23 In an attempt to distract from the important substantive issues raised by AutoZone's motion,
 24 Plaintiff contends that the motion is somehow a motion for reconsideration of the Court's denial of
 25 AutoZone's Rule 21A(3) motion. This argument is absurd. First, the motion to stay and consolidate
 26

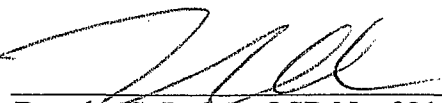
1 is not a motion to dismiss; it asks for different kinds of relief and requires the Court and parties to
 2 address substantively different questions of law. Second, and in any event, AutoZone's Rule 21A(3)
 3 motion was *not* decided on the merits. The Court denied it because AutoZone did not comply with
 4 the conferral requirements of UTCR 5.010, as stringently construed by the decision of the Court of
 5 Appeals in *Anderson v. State Farm Mutual Auto Insurance Co.*, 217 Or App 592 (2008), which came
 6 down the day before the hearing on the Rule 21A(3) motion.
 7

8 Finally, Plaintiff attempts to posture for later certification proceedings by asserting that
 9 AutoZone's current arguments in support of staying and consolidating should estop it from later
 10 arguing that there are no questions of law or fact common to the class or that there is no
 11 predominance of common questions of law or fact over individual ones. *See* Pls. Resp. at 4 n.3.
 12 Plaintiff is again mistaken. AutoZone's argument here is that the *Joarnt* and *Migis* actions share the
 13 same parties, counsel, allegations, and claims; not that the putative members of each action's class
 14 share the requisite commonality to secure class certification. Thus, plaintiff's attempts at clouding
 15 the real issue before this Court should be rejected.
 16

17 IV. CONCLUSION

18 In sum, the Court, pursuant to its inherent authority to regulate its own docket and determine
 19 the fairest course for the parties, should completely stay this action pending resolution of the *Joarnt*
 20 appeal, and upon such resolution, consolidate or coordinate the actions for discovery and trial.
 21

22 Dated: March 4, 2008



23 Douglas S. Parker, OSB No. 821017
 dparker@littler.com
 24 Neil N. Olsen, OSB No. 053378
 nolsen@littler.com

25 Attorneys for Defendant AutoZone, Inc.
 26

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2008 I served a full, true, and correct copy of the foregoing **DEFENDANT AUTOZONE, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO CONSOLIDATE AND STAY PROCEEDINGS:**

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By



Neil N. Olsen

mp

ENTERED
MAR 10 2008
N REGISTER BY EG

FILED
FEB 26 2008
Circuit Courts
Multnomah County, Oregon

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, *et al.*,

Plaintiffs,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

PETITION AND [PROPOSED]
ORDER FOR EXPEDITED
HEARING

Comes now PLAINTIFF MICHAEL MIGIS, by the attorneys named below, and petitions for an expedited hearing on the motion indicated below. The underlying Motion and Declaration are presented herewith for filing with the Clerk.

1. *Nature of the underlying motion for which an expedited hearing is requested:*

- ✓ Motion to Compel
- ✓ Other Motion as Follows: Determine Sufficiency of Defendant's Responses to Plaintiff's First Requests for Admission

2. *Nature of the emergency which requires the setting of the motion to be expedited:*

Plaintiff filed this case in November 2007 as a class action; Defendants filed an ORCP 21A(3) Motion to Dismiss, and a Motion for Temporary Stay of Discovery (pending the motion to dismiss). Defendant refused to produce any discovery, but committed to supplement its discovery responses should this matter survive those Motions.

On February 7, 2008, The Hon. Jerome LaBarre denied Defendant's Motions. Defendant then again refused to produce the information at issue (and necessary for moving for class certification), claiming that it would instead file a motion for consolidation and stay of discovery.

ORIGINAL

- DATED February 22, 2008.

A.E. "BUD" BAILEY, OSB 87157
CHEY POWELSON, OSB 03551
Attorneys for Plaintiff

The request for expedited hearing is GRANTED.

Call Date _____ Hearing Date _____

Failure to report at call pursuant to SLR 7.055(8)(A) will result in an expedited motion being stricken pursuant to UTCR 1.090.

For expedited motions you must comply with the praecipe requirements of SLR 5.015.

Pursuant to UTCR 7.040, the parties shall report immediately to the court any resolution of this matter prior to the call date.

Dated this _____ day of February 2008.

Multnomah Co. Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Petition and Order for Expedited Hearing** upon:

Douglas Parker
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

by the following indicated method or methods:

[X] by **faxing** a full, true, and correct copy thereof to the person at facsimile number 503-961-7854, which is the last-known fax number for the person, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed. Attached herewith is the confirmation of receipt which was generated by the transmitting machine.

DATED: February 22, 2008



CHEY POWELSON, OSB 03551
Of Attorneys for Plaintiff

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY
08 FEB 26 AM 11:21
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

Michael Migus
Plaintiff

v.

Autozone, Inc
Defendant

ENTERED Case No. 071-13531
MAR 10 2008 ORDER RE:
IN REGISTER BY EG EXPEDITED MOTION HEARING

Petitioner's request for an expedited setting of the motion IT's to compel discovery is:

☐ Denied, and the underlying motion is returned to petitioner for scheduling in regular course.

☐ Denied, with leave to present the underlying motion to the trial judge.

☐ Allowed, and underlying motion is _____ without further hearing.

☒ Allowed, and underlying motion is assigned to Judge La Barre for hearing. Petitioner shall contact the assigned judge, in coordination with all necessary parties, to set a date and time.

Date signed: February 25, 2008

Christopher Marshall
Signature

Christopher J. Marshall
Name of Judge Typed or Printed

To be heard on an expedited basis with ^{2's} motions to consolidate and stay discovery. Parties to contact Judge La Barre to schedule.

ORDER RE: EXPEDITED HEARING

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5 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
6 **FOR THE COUNTY OF MULTNOMAH**

7 **MICHAEL MIGIS**, individually, and on
8 behalf of all others similarly situated,

9 Plaintiff,

10 v.

11 **AUTOZONE, INC.**,

12 Defendant.
13

Case No. 0711-13531

**REPLY SUPPORTING
PLAINTIFF'S FIRST MOTION FOR
AN ORDER COMPELLING
DISCOVERY, AND DETERMINING
THE SUFFICIENCY OF
DEFENDANT'S RESPONSES TO
PLAINTIFF'S REQUESTS FOR
ADMISSION**

14
15 **I. INTRODUCTION**

16 In its opposition to Plaintiff's Motion to compel, Defendant:

- 17 (1) Fails to rebut Rule 43's express requirement that a party objecting to discovery must
18 do so by the date a response is due; and
19 (2) Fails to show good cause that Plaintiff's discovery requests are unduly burdensome.

20 The Court should therefore order Defendant to produce all documents responsive to: (a)
21 Plaintiff's First Set of Requests For Production Nos. 1 - 6 seeking class certification-related
22 information for a one year time period, back from the date of November 2007; and (b) Plaintiff's
23 Second Set of Requests For Production, to which AutoZone refused to object or respond.

24 ///

25 ///

26
Page 1 - **REPLY SUPPORTING PLAINTIFF'S FIRST MOTION FOR AN ORDER COMPELLING
DISCOVERY**

II. POINTS & AUTHORITIES

A. Defendant Waived the Objections It Now Raises in Response to the Motion to Compel.

1. Plaintiff's Second Set of Requests For Production

A court shall construe the Oregon Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action." ORCP 1B. Defendant AutoZone's responses to Plaintiff's Second set of request for production undermine Rule 1. Defendant refused to respond until six weeks after the due date (and after Plaintiff filed a motion to compel), and only then did AutoZone: (a) lodge multiple objections; and (b) refuse to produce the requested information. See *Powelson Reply Decl.*, Exs. A & B (Defendant's objections). In fact, AutoZone counsel Leigh Ann Tift has subsequently described Plaintiff's waiver argument as "patently foolish." *Id.*, Ex. A.

But Rule 43B is clear: a party must respond or object to a discovery request by the due date.¹ "It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992). Accord, *Fonville v. District of Columbia*, 230 F.R.D. 38, 42 (D.D.C. 2005) (citing multiple authorities); and *Safeco Ins. Co. v. Rawstrom*, 183 F.R.D. 668, 671 (C.D. Cal. 1998) (in context of answering interrogatories, Court stating, "Objections not interposed in a timely initial response may not be held in reserve and interposed after the period allowed for

¹ Defendant is mistaken to suggest that ORCP 46D (which includes a provision for sanctions for failing to respond to discovery) only applies to a deponent who fails to produce documents at a deposition. The heading of that Rule indicates as much, as does the following case law discussing the analogous Federal Rule 37(d): *Western Assoc. of Health Care Providers v. Harris*, 1982 U.S. Dist. LEXIS 11602, *3-4 (D.Or., April 6, 1982); *Sigliano v. Mendoza*, 642 F.2d 309 (9th Cir. 1981); and *Toma v. Weatherford*, 846 F.2d 58, 60 (10th Cir. 1988); *Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359, 1362 (Fed.Cir. 1990); and *United States v. Reyes*, 307 F.3d 451, 457-58 (6th Cir. 2002). Nonetheless, for whatever reason Defendant argues against the existence of a 46D safe harbor provision, and for purposes of this motion only Plaintiff stipulates to Defendant's express waiver of any safe harbor provision that may have been available to it (notwithstanding the UTCR 5.010 violations).

1 response[.]”). Cf. *Lybbert v. Grant County*, 141 Wash.2d 29, 39 (2000) (in context of waiver of
 2 an affirmative defense, Court stating, “If litigants are at liberty to act in an inconsistent fashion
 3 or employ delaying tactics, the purpose behind the procedural rules may be compromised.”).

4 An Oregon Court of Appeals has found that a later-asserted claim of “trade secret” had
 5 not been waived simply because the responding party, though failing to expressly object, had
 6 indicated that disclosure was “conditional,” and the “time agreed for production was ‘somewhat
 7 indefinite.’” *Citizens’ Utility Bd. v. Oregon Public Utility Comm’n*, 128 Ore. App. 650, 657
 8 (1994). Cf. *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 206 (D. Kan. 1996) (“the Rules do not provide
 9 for the reservation of objections”).

10 However, *Citizens’* is distinguishable from this case because AutoZone’s counsel failed
 11 to respond or object to the Second Set of discovery requests in any form, and the time to respond
 12 was definite: 30 days from the date of service. AutoZone’s refusal to timely object undermines
 13 “the general philosophy of the pretrial disclosure discovery rules, namely to facilitate the swift
 14 and efficient disclosure of all information relevant to the subject matter of a case.” *Rawstrom*,
 15 183 F.R.D. at 671.

16 Plaintiff’s Second set of discovery requested information relevant to the subject matter
 17 of the case: employee driving and delivery policies (RFP Nos. 1 - 3); documents reflecting missed
 18 meal periods (RFP No. 4); Plaintiff’s weekly work schedules (RFP No. 5); all weekly
 19 summarization of hours Plaintiff worked (RFP No. 6); and store security system time logs (RFP
 20 Nos. 7 - 8), which are usually more accurate than time records showing when an employee began
 21 and ended work. *Powelson Reply Decl.*, Ex. B.

22 The total of 10 weeks before AutoZone even objected may have a ripple effect on the
 23 entire course of this litigation, both in the context of class certification, and the default, one-year
 24 to trial requirement in Multnomah County. The Court should therefore not permit Defendant to
 25 interpose numerous objections long-since waived. Those objections will only further delay this
 26

1 case and a full and fair opportunity to discover the merits of the parties' claims and defenses.

2 The Court should order production of the requested documents.

3 2. *Plaintiff's First Set of Discovery Requests (including Requests For Admission)*

4 Defendant's initial responses to Plaintiff's First Set of discovery requests, including the
 5 Requests For Admission, did not include objections that the requests were "overbroad" or unduly
 6 burdensome, but rather expressly referenced AutoZone's commitment to supplement its responses
 7 "[i]f this matter survives Defendant's Motion to Dismiss or if Defendant's Motion to Stay
 8 Discovery is not granted[.]" Defendant had from November 2007 until January 10 to lodge proper
 9 objections. On February 29, however, Defendant lodged additional objections, and refused to
 10 produce information in response to the requests, which incorporate a time period of one year,
 11 back from the date of filing in November 2007. *Powelson Reply Decl.*, Ex. C. The discovery
 12 does not overlap with the *Joarnt* discovery.

13 On February 29 Defendant also "supplemented" its responses to Plaintiff's Requests For
 14 Admission with a plethora of additional objections, followed by denials. *Powelson Reply Decl.*,
 15 Ex. C. Because Plaintiff's Requests for Production 2, 4, and 6 request all documents supporting
 16 Defendant's denials, even if this Court declines to deem Plaintiff's Requests For Admission as
 17 admitted, it should nonetheless order: (a) that Defendant's objections are waived; and (b) that
 18 Defendant produce the documents in response to RFP Nos. 2, 4 and 6.

19 **B. Defendant Fails to Show Good Cause As to How Plaintiff's Discovery Requests are**
 20 **"Overbroad" or Unduly Burdensome.**

21 Even if the Court declines to find AutoZone waived its objections to any of the discovery
 22 requests at issue, AutoZone has not made the requisite showing that the requests are, in fact,
 23 overly broad or unduly burdensome.

24 "A request for discovery must often be couched in broad terms, because the significance
 25 of the material cannot always be determined until it has been inspected." *Vaughan v. Taylor*, 79

1 Or App 359, 365 (1986), *rev. den.*, 301 Or 445 (1986). See also *Pacific Northwest Bell Tel. Co.*
 2 *v. Century Home Components, Inc.*, 261 Or 333, 339 (1971). The broad right to discovery is
 3 “based on the general principle that...wide access to relevant facts serves the integrity and fairness
 4 of the judicial process by promoting the search for the truth.” *Rivera v. Nibco, Inc.*, 384 F.3d 822,
 5 824 (9th Cir. 2004) (cite and quotes omitted). See also *Hickman v. Taylor*, 329 U.S. 495, 507-08
 6 (1947).

7 If a party refuses to produce otherwise discoverable information, the party should move
 8 for a protective order under ORCP 36C. Objections that a discovery request is overly broad or
 9 unduly burdensome requires that the objecting party support those claims with sufficient
 10 specificity; the party cannot rely upon “stereotyped and conclusory statements.” See *Gulf Oil Co.*
 11 *v. Bernard*, 452 U.S. 89, 102 n. 16 (1981); and *Lawrence v. First Kan. Bank & Trust Co.*, 169
 12 F.R.D. 657, 659 (D.Kan. 1996).

13 Rule 36C requires a showing of good cause as to why production would be, for example,
 14 unduly burdensome or expensive. The “good cause” standard “typically imposes an obligation
 15 on the objecting party to provide an affidavit or other evidentiary proof of the time or expense
 16 involved.” *Waddell & Reed Fin., Inc. v. Torchmark Corp.*, 222 F.R.D. 450, 454 (D. Kan. 2004).²
 17 “Broad allegations of harm unsubstantiated by specific examples or articulated reasoning do not
 18 satisfy the good cause requirement.” *Citizens’ Utility Board* at 658 (cite omitted).³

19 AutoZone fails to show good cause why Plaintiff’s Second Set of requests for production
 20 are “burdensome,” “overbroad,” or “unduly invasive” of employee privacy interests. For example,
 21

22 ² See also *In re Convergent Technologies Securities Lit.*, 108 F.R.D. 328, 339 (N.D.Cal.
 23 1985) (Court explaining that “the party feeling victimized could submit competent affidavits and/or other
 24 documentary evidence that squarely contradicts...its opponent’s position, along with briefs showing how,
 under the relevant law, its opponent’s position is meritless.”); and *Hammond v. Lowe’s Home Ctrs., Inc.*,
 216 F.R.D. 666, 672 (D.Kan. 2003).

25 ³ Because ORCP 46A(2) incorporates ORCP 36C, the latter Rule’s standards apply to this
 26 analysis.

1 there is no affidavit from an AutoZone employee, or even AutoZone's counsel, representing it
 2 will take "X number of hours" and "Y number of people" to produce the information requested,
 3 at an "estimated cost of Z" to the company. Defendant also fails to explain how its employees'
 4 privacy interests would be compromised by production of clock in and clock out times.

5 Plaintiff raised the issue (lack of good cause) in response to Defendant's prior Motion for
 6 Temporary Stay of Discovery. But four weeks later Defendant is still unable to show good cause,
 7 and instead makes stereotyped and conclusory arguments unsupported by sworn testimony. The
 8 same rationale applies to Defendant's objections to Plaintiff's Second Set of Requests For
 9 Production: Defendant's arguments and objections fail under ORCP 36C.

10 Finally, whether production of the documents Plaintiff requested in both sets of discovery
 11 will affect the pre-class certification, and the determination of certification itself. While
 12 AutoZone argues against "overreaching" in discovery in the class action context, in this case
 13 AutoZone will not produce any class-related discovery absent a Court order. AutoZone seems
 14 to ignore the Court's obligation under ORCP 32C(1) to make findings of fact and conclusions
 15 of law explaining why an action is or is not maintainable as a class action.

16 It is therefore proper to:

17 [A]fford the litigants an opportunity to present evidence as to whether a
 18 class action [is] maintainable. And, the necessary antecedent to the
 19 presentation of evidence is...enough discovery to obtain the material,
 20 **especially when the information is within the sole possession of the**
 21 **defendant.**

22 *Donniger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977) (bold added). See
 23 also ORCP 32E(1); *Armstrong v. Davis*, 275 F.3d 849, 871-2 and 879, n. 28 (9th Cir. 2001) (A
 24 court "may permit discovery to determine whether class certification is appropriate." (cite
 25 omitted); *In re "Dalkon Shield" IUD Prods.*, 526 F. Supp. 887, 917 (N.D.Cal. 1981); and *Doctor*

1 v. *Seaboard Coast Line R. Co.*, 540 F.2d 699, 707 (4th Cir. 1976).

2 In fact, "in making a certification decision, a judge must look somewhere between the
3 pleading and the fruits of discovery...." *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2nd
4 Cir. 1982), *cert. den.*, 459 U.S. 838 (1982) (quotes omitted). See also *Richard v. Bell Atlantic*
5 *Corp.*, 976 F.Supp. 40, 51-2 (D.D.C. 1997) (Explaining that "it would have been extremely unfair
6 and inefficient for [the trial judge] to have denied plaintiffs their right to pre-class certification
7 discovery, but then to have required them to file a motion for class certification without benefit
8 of any such discovery.").

10 III. CONCLUSION

11 Plaintiff respectfully requests the Court grant Plaintiff's First Motion to compel discovery.

14 DATED this 5th day of March 2008.

16 
17 A.E. "BUD" BAILEY, OSB 87157
18 CHEY POWELSON, OSB 03551
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Reply Supporting Plaintiff's First Motion for an Order Compelling Discovery, and Determining the Sufficiency of Defendant's Responses to Plaintiff's Requests for Admission** upon:

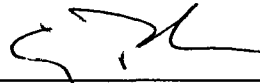
Douglas Parker
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

by the following indicated method or methods:

[X] by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on the date set-forth below.

[X] by **faxing** a full, true, and correct copy thereof to the person at facsimile number 503-961-7854, which is the last-known fax number for the person, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed. Attached herewith is the confirmation of receipt which was generated by the transmitting machine.

DATED: March 5, 2008



CHEY POWELSON, OSB 03551
Attorney for Plaintiff

Up

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, *et al.*,

Case No. 0711-13531

Plaintiff,

v.

**REPLY DECLARATION OF
CHEY K. POWELSON
SUPPORTING PLAINTIFF'S
FIRST MOTION FOR AN ORDER
COMPELLING DISCOVERY**

AUTOZONE, INC.,

Defendant.

I, Chey K. Powelson, hereby declare as follows:

1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter, and base the contents of this declaration on my own personal knowledge and/or the litigation files and documents my firm maintains for this litigation.
2. Attached hereto as **Exhibit A** is a true and correct copy of AutoZone counsel Leigh Ann Tift's March 3, 2008 letter to Plaintiff's counsel.

///


///

1 3. Attached hereto as **Exhibit B** is a true and correct copy of Defendant's initial,
2 February 29, 2008 responses and objections to Plaintiff's Second Set of Requests For
3 Production.

4
5 4. Attached hereto as **Exhibit C** is a true and correct copy of Defendant's February 29,
6 2008 supplemental objections and responses to Plaintiff's First Set of discovery
7 requests at issue in Plaintiff's First Motion for Order Compelling Discovery.
8

9 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
10 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
11 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR
12 PERJURY.

13
14 Dated this 5th day of March in Vancouver, Washington.

15
16 
17 CHEY POWELSON, OSB 03551
18 Attorney for Plaintiff
19
20
21
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23
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25
26

PLAINTIFF'S REPLY
EXHIBIT
A



March 3, 2008

Leigh Ann Tift
Direct: 206.381.4905
Direct Fax: 206.447.6965
ltift@littler.com

VIA REGULAR MAIL AND ELECTRONIC MAIL

Chey K. Powelson
BAILEY, PINNEY & ASSOCIATES, LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA

Re: Migis v. AutoZone, Inc.
Multnomah County Circuit Court No. 0711-13531

Dear Mr. Powelson:

We are in receipt of your most recent demand to confer. As I understand the substance of your letter, you contend that we are not permitted to object, on behalf of AutoZone, to Plaintiff's discovery requests. This position is patently foolish.

Moreover, you cannot now demand to confer about the objections we've included in our discovery responses because you presently have a motion to compel pending before the Court. If you believe the motion to compel was premature, strike it and we will schedule a conference. You knew very well that we intended to supplement our discovery responses when you filed the motion to compel. If you intend to go forward with the motion to compel, it is incumbent on you to make sure that all of your contentions regarding this discovery are before the court. We are not going to agree to conduct multiple, duplicative conferences over discovery, so that you can then file discovery motions on top of other, pending discovery motions.

Finally, with regard to the demand that we "stipulate" to the scope of the Joarnt class, we decline. The Joarnt matter is stayed. I think Judge Kantor could not have been clearer, last year, when he informed both parties that if any action is to be taken in the Joarnt case Plaintiff's counsel would have to stipulate to lifting the stay. At the time, I believe your firm indicated you were not at all interested in doing so, and I can tell you that we are not willing to permit Plaintiffs to pick and choose when they will observe the terms of the stay and when they will not.

THE NATIONAL EMPLOYMENT & LABOR LAW FIRM SM

Bank of America Tower, 701 Fifth Avenue, Suite 6500, Seattle, Washington 98104-7097 Tel: 206.623.3300 Fax: 206.447.6965 www.littler.com

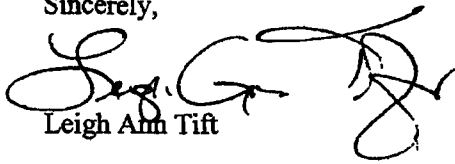
EXHIBIT A

Page 1

March 3, 2008

Page 2

Sincerely,


Leigh Ann Tift

LAT:sls

cc: Douglas Parker
Jennifer Mora
Alison Smith

Firmwide:84469812.1 013306.2124

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EXHIBIT A
Page 2

**PLAINTIFF'S REPLY
EXHIBIT
B**

Feb-29-2008 05:12 PM LITTLER MENDELSON P.C. (502) 226-2791

2/30

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S OBJECTIONS AND
RESPONSES TO PLAINTIFF'S SECOND
SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS**

Defendant AutoZone, Inc. ("Defendant") hereby submits its objections and responses to
Plaintiff's Second Set of Requests for Production of Documents as follows:

GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this
lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery
requests to the extent they purport to require any actions not required by the Oregon Rules of Civil
Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this
objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope
of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to
lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation
greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests
to the extent they call for information or documents that fall within any relevant privilege (including

PAGE 1 – DEFENDANT'S OBJECTIONS AND RESPONSES
TO PLAINTIFF'S SECOND SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

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Portland, OR 97201
Phone: 503-221-0309 Fax: 503-242-2457

EXHIBIT B
Page 1

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3/30

1 without limitation the attorney-client privilege), that are within the work product doctrine, or that
2 constitute trial preparation materials.

3 (c) No Waiver. Nothing set forth in Defendant's specific objections, general objections
4 or responses is intended as or should be construed as a waiver of these general objections, or of any
5 specific objections set forth.

6 (d) Reservation of Rights. Defendant reserves the right to move later for a protective
7 order or otherwise to seek relief from the court if the parties are unable to resolve Defendant's
8 objections by agreement.

9 (e) Publicly Available Documents. Defendant objects to producing publicly available
10 documents (including without limitation court records) that are, due to their public availability,
11 equally available to the requesting party.

12 (f) Pending Motion to Consolidate and Stay. Defendant objects to responding to these
13 requests in their entirety in light of Defendant's Motion to Consolidate and Stay, which is currently
14 pending before the Court. If this matter survives Defendant's Motion to Consolidate and Stay,
15 Defendant will supplement its responses to these requests.

16 (g) Pending Stay of Discovery. Defendant further objects to these discovery requests to
17 the extent that they seek to evade Judge Kantor's January 27, 2006 ruling in *Joarnt et al. v.*
18 *AutoZone, Inc.* ("Joarnt Action") that all discovery in that matter has been stayed during the
19 pendency of an appeal to the Oregon Court of Appeals in the Joarnt Action.

20 (h) Objections to Requests Exceeding Pre-Certification Issues. Defendant objects to the
21 discovery requests to the extent they (1) seek information about current and former employees who
22 are not class representatives and (2) exceed the issue of class certification. To the extent not
23 objectionable for other reasons, Defendant will answer and respond to the requests as they apply to
24 the class representative, Plaintiff Migis.

25
26
PAGE 2 – DEFENDANT'S OBJECTIONS AND RESPONSES
TO PLAINTIFF'S SECOND SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

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EXHIBIT BPage 2

1 (i) Amendment/Supplementation. This matter presently is still being investigated by
2 Defendant and its counsel, and Defendant therefore reserves the right to amend and supplement its
3 responses as reasonably may be necessary.

4 (j) No Private Right of Action. Defendant further objects to these discovery requests to
5 the extent they seek information about alleged meal period violations insofar as Plaintiffs do not
6 have a private right of action for such a claim. *See Gafur v. Legacy Good Samaritan Hospital and*
7 *Medical Center*, 213 Or. App. 343 (2007).

8 (k) Electronic Discovery. Defendant objects to these discovery requests to the extent
9 they seek electronic discovery as being overbroad and unduly burdensome and the need for any
10 electronic discovery does not outweigh the burdens and hardships to Defendant of searching
11 electronic information.

12 (l) To the extent that any discovery request seeks documents that are also sought by or
13 identified pursuant to any other request, Defendant declines to produce or identify multiple copies of
14 such documents, and Defendant states that each document produced or identified pursuant to any
15 request is also produced pursuant to any other request to which it is responsive.

16 Defendant's response to each request specifically incorporates these General Objections by
17 this reference.
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PAGE 3 - DEFENDANT'S OBJECTIONS AND RESPONSES
TO PLAINTIFF'S SECOND SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

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EXHIBIT B

Page 3

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1 **REQUEST FOR PRODUCTION NO. 3:** Produce all documents containing or referencing
 2 Defendant's daily merchandise and/or parts delivery and pick-up schedule in place during the course
 3 of Plaintiff's employment with Defendant for all Defendant Stores where Plaintiff worked and
 4 delivered.

5 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 6 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 7 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
 8 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
 9 Yamaoka's Third Requests for Production, RFP No. 9, in Cause No. 053-02795.

10 **REQUEST FOR PRODUCTION NO. 4:** Produce all documents and reports reflecting
 11 dates and times when any AutoZone employees working in the State of Oregon missed their meal
 12 periods, for the period of time from three (3) years prior to the filing of the Complaint, up to present.
 13 This Request includes any and all, if applicable, "Missed Lunch Reports" and "Lunch Variance
 14 Reports."

15 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 16 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 17 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
 18 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
 19 Yamaoka's Fourth Requests for Production, RFP No. 7, in Cause No. 053-02795.

20 **REQUEST FOR PRODUCTION NO. 5:** Produce all "Weekly Schedule" reports
 21 referencing Plaintiff's work schedule, both approved and unapproved, for the period of time from
 22 three (3) years prior to the filing of the Complaint, up to present.

23 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 24 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 25 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
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PAGE 5 – DEFENDANT'S OBJECTIONS AND RESPONSES
 TO PLAINTIFF'S SECOND SET OF REQUESTS FOR
 PRODUCTION OF DOCUMENTS

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EXHIBIT B

Page 5

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1 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
 2 Yamaoka's Third Requests for Production, RFP No. 11, in Cause No. 053-02795.

3 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents and reports reflecting
 4 any weekly summarization of hours worked by Plaintiff, whether individually or by inclusion in a
 5 larger group, for the period of time from three (3) years prior to the filing of the Complaint, up to
 6 present.

7 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 8 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 9 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
 10 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
 11 Yamaoka's Fourth Requests for Production, RFP No. 9, in Cause No. 053-02795.

12 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents or records such as
 13 security logs, or records, identifying when a security system in any AutoZone store in which
 14 Plaintiff worked was activated and/or deactivated during Plaintiff's employment period.

15 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 16 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 17 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
 18 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
 19 Yamaoka's Fourth Requests for Production, RFP No. 11, in Cause No. 053-02795.

20 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that identify, or which
 21 record or can be used to identify, the names of the persons activating and/or deactivating security
 22 systems at stores in which Plaintiff worked for AutoZone during Plaintiff's employment period.

23 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 24 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 25 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
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PAGE 6 -- DEFENDANT'S OBJECTIONS AND RESPONSES
 TO PLAINTIFF'S SECOND SET OF REQUESTS FOR
 PRODUCTION OF DOCUMENTS

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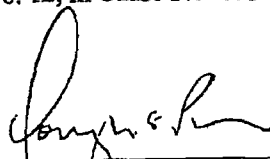
EXHIBIT 3
 Page 6

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1 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joamt and
2 Yamaoka's Fourth Requests for Production, RFP No. 12; in Cause No. 053-02795.

3 Dated: February 29, 2008

4 
5 Douglas S. Parker OSB No.82101
6 LITTLER MENDELSON
A Professional Corporation

7 Attorneys for Defendant
8 Autozone Inc.
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PAGE 7 - DEFENDANT'S OBJECTIONS AND RESPONSES
TO PLAINTIFF'S SECOND SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

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EXHIBIT B

Page 7

PLAINTIFF'S REPLY
EXHIBIT
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10/30

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S FIRST SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
PLAINTIFF'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Defendant AutoZone, Inc. ("Defendant") hereby submits its supplemental objections and responses to Plaintiff's First Set of Requests for Production of Documents as follows:

SUPPLEMENTAL GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery requests to the extent they purport to require any actions not required by the Oregon Rules of Civil Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests to the extent they call for information or documents that fall within any relevant privilege (including

PAGE 1 - DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

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EXHIBIT C

1 without limitation the attorney-client privilege), that are within the attorney work product doctrine,
2 or that constitute trial preparation materials.

3 (c) No Waiver. Nothing set forth in Defendant's specific objections, general objections
4 or responses is intended as or should be construed as a waiver of these general objections, or of any
5 specific objections set forth.

6 (d) Reservation of Rights. Defendant reserves the right to move later for a protective
7 order or otherwise to seek relief from the court if the parties are unable to resolve Defendant's
8 objections by agreement.

9 (e) Publicly Available Documents. Defendant objects to producing publicly available
10 documents (including without limitation court records) that are, due to their public availability,
11 equally available to the requesting party.

12 (f) Non-conformance with ORCP 45A. Defendant objects to all requests for admission
13 contained in these discovery requests insofar as (1) they are not included in a separate document and
14 (2) they do not include the "notice" language contained in ORCP 45A that is required to be included
15 in any and all requests for admission.

16 (g) Pending Motion to Consolidate and Stay. Defendant objects to responding to these
17 requests in their entirety in light of Defendant's Motion to Consolidate and Stay, both of which are
18 currently pending before the Court. Nothing in these responses, including Defendant's refusal to
19 respond, should be construed as an admission to the substance of any particular request for
20 admission.

21 (h) Defendant further objects to these discovery requests to the extent that they seek to
22 evade Judge Kantor's January 27, 2006 ruling in *Joarnt et al. v. AutoZone, Inc.* ("Joarnt Action") that
23 all discovery in that matter has been stayed during the pendency of an appeal to the Oregon Court of
24 Appeals in the Joarnt Action.

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PAGE 2 - DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

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EXHIBIT

1 (i) Objections to Requests Exceeding Pre-Certification Issues. Defendant objects to the
2 discovery requests to the extent they (1) seek information about current and former employees who
3 are not class representatives and (2) exceed the issue of whether a class may be properly certified.
4 Defendant will answer and respond to the requests as they apply to the singularly named plaintiff,
5 Michael Migis.

6 (j) Amendment/Supplementation. This matter presently is still being investigated by
7 Defendant and its counsel, and Defendant therefore reserves the right to amend and supplement its
8 responses as reasonably may be necessary.

9 (k) Defendant further objects to these discovery requests to the extent they seek
10 information about alleged meal period violations insofar as Plaintiffs do not have a private right of
11 action for such a claim. *See Gafur v. Legacy Good Samaritan Hospital and Medical Center*, 213 Or.
12 App. 343 (2007).

13 (l) Electronic Discovery. Defendant objects to these discovery requests to the extent
14 they seek electronic discovery as being overbroad and unduly burdensome and the need for any
15 electronic discovery does not outweigh the burdens and hardships to Defendant of searching
16 electronic information.

17 (m) To the extent that any discovery request seeks documents that are also sought by or
18 identified pursuant to any other request, Defendant declines to produce or identify multiple copies of
19 such documents, and Defendant states that each document produced or identified pursuant to any
20 request is also produced pursuant to any other request to which it is responsive.

21 Defendant's response to each request specifically incorporates these General Objections by
22 this reference.

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PAGE 3 – DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

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EXHIBIT

C
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Feb-29-2008 05:15 PM LITTLER MENDELSON P.C. (502) 226-2791

14/30

1 who worked in the State of Oregon, seeks information that is beyond class certification issues, and
 2 seeks information about individuals other than Plaintiff Migis. Finally, Defendant objects to the
 3 request for electronically stored information as overbroad and unduly burdensome given that any
 4 need for such information is outweighed by the burden to Defendant of searching its electronic
 5 records. Without waiving its objections, see Answer to RFA 1.

6 **REQUEST FOR PRODUCTION NO. 2:** If Defendant denies RFA No. 1, produce all
 7 documents and electronically stored information for all involuntarily terminated employees within
 8 the referenced time period which Defendant relies upon to support its denial. Produce documents
 9 and records in electronic format. If electronic format is unavailable, produce in original format.
 10 This request includes, but is not limited to, Documents and Electronic Data as defined above.

11 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 12 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 13 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
 14 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
 15 who worked in the State of Oregon, seeks information beyond the proper scope of pre-certification
 16 discovery, and seeks information about individuals other than Plaintiff Migis. Defendant also
 17 objects to the request for electronically stored information as overbroad and unduly burdensome
 18 given that any need for such information is outweighed by the burden to Defendant of searching its
 19 electronic records.

20 **REQUEST FOR ADMISSION NO. 2:** Admit that Defendant failed to immediately pay
 21 all wages earned and unpaid to at least one employee who gave not less than 48 hours' notice of their
 22 intention to quit, within the 12 months preceding the date of the filing of this lawsuit.

23 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 24 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 25 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
 26

PAGE 5 - DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
 AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
 PRODUCTION OF DOCUMENTS

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1 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
 2 who worked in the State of Oregon, seeks information that is beyond the proper scope of pre-
 3 certification discovery, and seeks information about individuals other than Plaintiff Migis. Without
 4 waiving its objections and limiting its response to Plaintiff Migis, Defendant has not knowingly
 5 failed to pay any employee final wages on time, is unaware of any instance where it has done so, and
 6 therefore denies this Request on that basis. Defendant further asserts that its policies and procedure
 7 intend that employees be paid final wages within the time frames set out in the applicable Oregon
 8 statutes.

9 **REQUEST FOR PRODUCTION NO. 3:** If Defendant admits RFA No. 2, produce all
 10 documents and electronically stored information for all employees who gave not less than 48 hours'
 11 notice of their intention to quit, to whom Defendant failed to pay all wages earned and unpaid
 12 immediately at the time of quitting, within the referenced time period. Produce documents and
 13 electronically stored information in electronic format. If electronic format is unavailable, produce in
 14 original format. This request includes, but is not limited to, Documents and Electronic Data as
 15 defined above.

16 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 17 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 18 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
 19 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
 20 who worked in the State of Oregon, seeks information that is beyond class certification issues, and
 21 seeks information about individuals other than Plaintiff Migis. Defendant also objects to the request
 22 for electronically stored information as overbroad and unduly burdensome given that any need for
 23 such information is outweighed by the burden to Defendant of searching its electronic records.
 24 Without waiving its objections and limiting its response to Plaintiff Migis, *see* Answer to RFA 2.

25 ///

26
 PAGE 6 -- DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
 AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
 PRODUCTION OF DOCUMENTS

Littler Mendelson, PC
 1750 SW Harbor Way, Suite 450
 Portland, OR 97201
 Phone: 503-221-0309 Fax: 503-242-2437

1 **REQUEST FOR PRODUCTION NO. 4:** If Defendant denies RFA No. 2, produce all
2 documents and electronically stored information for all employees who gave not less than 48 hours'
3 notice of their intention to quit, within the referenced time period which Defendant relies upon to
4 support its denial. Produce documents and electronically stored information in electronic format. If
5 electronic format is unavailable, produce in original format. This request includes, but is not limited
6 to, Documents and Electronic Data as defined above.

7 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
8 Objections as though fully set forth herein and its specific objections to this request in Defendant's
9 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
10 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
11 who worked in the State of Oregon, seeks information beyond the proper scope of pre-certification
12 discovery, and seeks information about individuals other than Plaintiff Migis. Defendant also
13 objects to the request for electronically stored information as overbroad and unduly burdensome
14 given that any need for such information is outweighed by the burden to Defendant of searching its
15 electronic records.

16 **REQUEST FOR ADMISSION NO. 3:** Admit that Defendant failed to pay all wages
17 earned and unpaid within five business days after at least one employee quit without giving 48 hours'
18 notice, within the 12 months preceding the date of the filing of this lawsuit.

19 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
20 Objections as though fully set forth herein and its specific objections to this request in Defendant's
21 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
22 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
23 who worked in the State of Oregon, seeks information that is beyond the proper scope of pre-
24 certification discovery, and seeks information about individuals other than Plaintiff Migis. Without
25 waiving its objections and limiting its response to Plaintiff Migis, Defendant has not knowingly
26

PAGE 7--DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

Littler Mendelson, PC
1750 SW Harbor Way, Suite 450
Portland, OR 97201
Phone: 503-221-0309 Fax: 503-242-2457

EXHIBIT C

1 failed to pay any employee final wages on time, is unaware of any instance where it has done so, and
2 therefore denies this Request on that basis. Defendant further asserts that its policies and procedure
3 intend that employees be paid final wages within the time frames set out in the applicable Oregon
4 statutes.

5 **REQUEST FOR PRODUCTION NO. 5:** If Defendant admits RFA No. 3, produce all
6 documents and electronically stored information for all employees who quit, to whom Defendant
7 failed to pay all wages earned and unpaid within five business days, within the referenced time
8 period. Produce documents and electronically stored information in electronic format. If electronic
9 format is unavailable, produce in original format. This request includes, but is not limited to,
10 Documents and Electronic Data as defined above.

11 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
12 Objections as though fully set forth herein and its specific objections to this request in Defendant's
13 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
14 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
15 who worked in the State of Oregon, seeks information that is beyond class certification issues, and
16 seeks information about individuals other than Plaintiff Migis. Defendant also objects to the request
17 for electronically stored information as overbroad and unduly burdensome given that any need for
18 such information is outweighed by the burden to Defendant of searching its electronic records.
19 Without waiving its objections and limiting its response to Plaintiff Migis, *see* Answer to RFA 3.

20 **REQUEST FOR PRODUCTION NO. 6:** If Defendant denies RFA No. 3, produce all
21 documents and electronically stored information for all employees who quit without notice within
22 the referenced time period which Defendant relies upon to support its denial. Produce documents
23 and electronically stored information in electronic format. If electronic format is unavailable,
24 produce in original format. This request includes, but is not limited to, Documents and Electronic
25 Data as defined above.
26

PAGE 8 - DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

Littler Mendelson, PC
1750 SW Harbor Way, Suite 450
Portland, OR 97201
Phone: 503-221-0309 Fax: 503-242-2457

EXHIBIT

C

1 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 2 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 3 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
 4 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
 5 who worked in the State of Oregon, seeks information that is beyond the proper scope of pre-
 6 certification discovery, and seeks information about individuals other than Plaintiff Migis.
 7 Defendant also objects to the request for electronically stored information as overbroad and unduly
 8 burdensome given that any need for such information is outweighed by the burden to Defendant of
 9 searching its electronic records.

10 **REQUEST FOR PRODUCTION NO. 7:** Produce all employment agreements, contracts,
 11 covenants and addendums between Plaintiff and Defendant. This request includes but is not limited
 12 to correspondence stored on electronic disks, recording tapes, and computer banks.

13 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 14 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 15 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant also objects
 16 to the request for electronically stored information as overbroad and unduly burdensome given that
 17 any need for such information is outweighed by the burden to Defendant of searching its electronic
 18 records. Defendant does not enter into "employment agreements, contracts or covenants" with its
 19 employees. Without waiving such objection, Defendant has produced the personnel file of Plaintiff
 20 Migis in response to subsequent discovery requests.

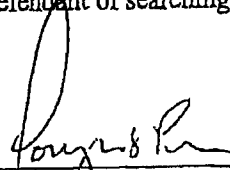
21 **REQUEST FOR PRODUCTION NO. 8:** Produce all correspondence wherein Plaintiff's
 22 name is mentioned, including all letters, e-mail correspondence, and correspondence stored on any
 23 data compilations from which information can be obtained or translated, if necessary, by Defendant
 24 through detection devices into reasonably usable form. This request includes but is not limited to
 25 correspondence stored on electronic disks, recording tapes, and computer banks.

PAGE 9 – DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
 AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
 PRODUCTION OF DOCUMENTS

Little Mendelson, PC
 1750 SW Harbor Way, Suite 450
 Portland, OR 97201
 Phone: 503-221-0309 Fax: 503-242-2457

1 for electronically stored information as overbroad and unduly burdensome given that any need for
2 such information is outweighed by the burden to Defendant of searching its electronic records.

3 Dated: February 29, 2008

4
5 
6 Douglas S. Parker OSB No.82101
LITTLER MENDELSON
A Professional Corporation

7 Attorneys for Defendant
8 Autozone Inc.
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PAGE 20 - DEFENDANT'S FIRST SUPPLEMENTAL OBJECTIONS
AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

Littler Mendelson, PC
1750 SW Harbor Way, Suite 450
Portland, OR 97201
Phone: 503-221-0309 Fax: 503-242-2457

ECADIT

C

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Reply Declaration of Chey K. Powelson Supporting Plaintiff's First Motion for an Order Compelling Discovery** upon:


Douglas Parker
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

by the following indicated method or methods:

☒ by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on the date set-forth below.

☒ by **faxing** a full, true, and correct copy thereof to the person at facsimile number 503-961-7854, which is the last-known fax number for the person, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed. Attached herewith is the confirmation of receipt which was generated by the transmitting machine.

DATED: March 5, 2008



CHEY POWELSON, OSB 03551
Attorney for Plaintiff

T

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY

Migis, Michael, et al.

Plaintiff(s)/Petitioner(s)

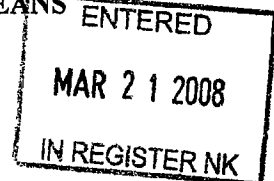
Case number: 0711-13531

08 MAR -7 PM 4:53

v.

FILED

ORDER RE REPORTING OF PROCEEDINGS
BY STENOGRAPHIC MEANS



Autozone, Inc., et al.

Defendant(s)/Respondent(s)

Based upon ORS 8.340 and the Stipulations of the parties as endorsed hereon, IT IS HEREBY ORDERED AS FOLLOWS:

At the expense of the parties, the following proceedings in this case may be reported by stenographic reporting: X The hearing of this date.
 _____ Trial, _____ in whole or _____ in part. If only part of the trial is to be reported by stenographic reporting, the parties and the reporter shall give reasonable notice to the Court in advance of what parts are to be stenographically reported and what parts are not to be stenographically reported.
 _____ Other (specify):

When a stenographic reporter is reporting the proceedings, the Court X will or _____ will not operate the electronic audio recording equipment. The official record of the proceedings will be X the record produced by the stenographic reporter when the stenographic reporter is present or _____ the electronic audio recording.

By endorsement hereon, the stenographic reporter agrees as follows:

1. The stenographic reporter will attend the court upon the schedule directed by the Judge. The lawyers will not control scheduling of the reporter's time, except the Judge may approve in advance the lawyers' request that only portions of the proceedings be reported by the stenographic reporter. ORS 8.340(1).
2. The stenographic reporter is an officer of the Court. ORS 8.340(3).
3. The notes of the stenographic reporter shall be filed in the office of the clerk of the court subject to the provisions of ORS 7.120. ORS 8.340(6).
4. Upon request, the reporter shall make a full and accurate transcript, certified as such as provided for in ORS 8.360, which shall be filed with the clerk of the court for use of the court or parties. ORS 8.350.
5. The stenographic reporter shall meet at least the following minimum competency requirements: The stenographic reporter shall be a "Certified Shorthand Reporter" as that phrase is defined in ORS 8.415(3), or the stenographic reporter shall be nationally certified as either a Registered Professional Reporter or a Certificate of Merit Reporter.

IT IS SO STIPULATED:

For Plaintiff(s)/Petitioner(s):

For Defendant(s)/Respondent(s):

I agree to comply with the terms of this Order:

Stenographic Reporter(s):

Wishia Matom 503-445-4104

Telephone number:

Dated this 7 day of March, 2008.

Jerome LaBarre
Jerome LaBarre, Circuit Court Judge

Order Re Reporting of Proceedings By Stenographic Means

1
2
3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4
5 FOR THE COUNTY OF MULTNOMAH

6 MICHAEL MIGIS, individually, and on
7 behalf of all other persons similarly
situated,

8 Plaintiff,

9 vs.

10 AUTOZONE INC., a Nevada
11 Corporation,

12 Defendant.

No. 0711-13531

ANSWER TO COMPLAINT

13 COMES NOW Defendant, AutoZone, Inc., and by way of Answer to Plaintiff's Complaint,
14 admits, denies, and alleges as follows:

15 **I. PRELIMINARY STATEMENT**

16 1. Answering Plaintiff's Paragraph 1, Defendant admits that this is an action by Plaintiff
17 for alleged claims to recover unpaid wages, overtime wages, minimum wages, and penalties.
18 Defendant denies that class certification is proper or that Plaintiff is a proper class representative.
19 To the extent that this Answer differs from the allegations of Paragraph 1, Defendant denies each
20 and every remaining allegation.

21 2. Answering Plaintiff's Paragraph 2, Defendant admits that it is a Nevada corporation
22 and the leading auto parts retailer in the United States with annual sales reaching several billion
23 dollars. Defendant further admits that it sells auto and light truck parts, chemicals, and accessories
24 through approximately 4,000 stores in the United States, including approximately 24 stores in
25 Oregon. To the extent that this answer differs from the allegations of Paragraph 2, Defendant denies
26 each and every remaining allegation.

1 3. Answering Plaintiff's Paragraph 3, Defendant denies the allegation.

2 4. Answering Plaintiff's Paragraph 4, Defendant contends that the allegations of
3 Paragraph 4 are legal contentions for which no answer is required.

4 5. Answering Plaintiff's Paragraph 5, Defendant contends that the allegations of
5 Paragraph 5 are legal contentions for which no answer is required.

6 6. Answering Plaintiff's Paragraph 6, Defendant denies the allegation.

7 7. Answering Plaintiff's Paragraph 7, Defendant contends that the allegations of
8 Paragraph 7 are legal contentions for which no answer is required.

9 8. Answering Plaintiff's Paragraph 8, Defendant denies the allegation.

10 9. Answering Plaintiff's Paragraph 9, Defendant denies the allegation.

11 10. Answering Plaintiff's Paragraph 10, Defendant denies the allegation.

12 11. Answering Plaintiff's Paragraph 11, Defendant denies the allegation.

13 **II. JURISDICTION AND VENUE**

14 12. Answering Plaintiff's Paragraph 12, Defendant lacks knowledge or information
15 relative to Plaintiff's information and beliefs sufficient to form an opinion regarding the truth or
16 falsity of the allegation, and therefore denies the allegation.

17 13. Answering Plaintiff's Paragraph 13, Defendant admits that it is a foreign corporation
18 doing business in Oregon as AutoZone, Inc.

19 **III. PARTIES**

20 14. Answering Plaintiff's Paragraph 14, Defendant admits that Plaintiff was previously
21 employed by Defendant, that Plaintiff worked in Oregon, and that at the time of his employment,
22 Plaintiff was subject to Oregon wage and hour laws. Defendant denies that Plaintiff is similarly
23 situated to all current and former Oregon employees, and/or the implication that class certification is
24 appropriate.

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16. Answering Plaintiff's Paragraph 16, Defendant admits that it is a foreign corporation doing business in Oregon as AutoZone, Inc. To the extent that this answer differs from the allegations of Paragraph 16, Defendant denies each and every remaining allegation.

16. Answering Plaintiff's Paragraph 16, Defendant admits that it is a foreign corporation doing business in Oregon as AutoZone, Inc. To the extent that this answer differs from the allegations of Paragraph 16, Defendant denies each and every remaining allegation.

IV. COMMON ALLEGATIONS

17. Answering Plaintiff's Paragraph 17, Defendant denies that it engaged in the conduct alleged and that any such conduct affected Plaintiff and all purported class members. Defendant contends that the remaining allegations of Paragraph 17 are legal contentions for which no answer is required. To the extent that this answer differs from the allegations of Paragraph 17, Defendant denies each and every remaining allegation.

18. Answering Plaintiff's Paragraph 18, Defendant admits that it operates stores in Oregon. Answering the remaining allegations contained in Paragraph 18, Defendant lacks knowledge or information relative to Plaintiff's information and beliefs sufficient to form an opinion regarding the truth or falsity of the allegation, and therefore denies the allegation. Defendant denies the implication that class certification is appropriate.

19. Answering Plaintiff's Paragraph 19, Defendant denies the allegation.

20. Answering Plaintiff's Paragraph 20, Defendant denies the allegation.

21. Answering Plaintiff's Paragraph 21, Defendant denies the allegation.

22. Answering Plaintiff's Paragraph 22, Defendant denies the allegation.

23. Answering Plaintiff's Paragraph 23, Defendant denies the allegation.

24. Answering Plaintiff's Paragraph 24, Defendant denies the allegation.

25. Answering Plaintiff's Paragraph 25, Defendant denies the allegation.

26. Answering Plaintiff's Paragraph 26, Defendant denies the allegation.

1 27. Answering Plaintiff's Paragraph 27, Defendant denies the allegation.

2 28. Answering Plaintiff's Paragraph 28, Defendant denies the allegation.

3 29. Answering Plaintiff's Paragraph 29, Defendant denies the allegation.

4 30. Answering Plaintiff's Paragraph 30, Defendant denies the allegation.

5 **V. CATEGORIES OF CLAIMS**

6 31. Answering Plaintiff's Paragraph 31, Defendant denies each and every allegation
7 contained in Paragraph 31.

8 32. Answering Plaintiff's Paragraph 32, Defendant denies each and every allegation
9 contained in Paragraph 32.

10 33. Answering Plaintiff's Paragraph 33, Defendant denies each and every allegation
11 contained in Paragraph 33.

12 34. Answering Plaintiff's Paragraph 34, Defendant denies each and every allegation
13 contained in Paragraph 34.

14 35. Answering Plaintiff's Paragraph 35, Defendant denies each and every allegation
15 contained in Paragraph 35.

16 36. Answering Plaintiff's Paragraph 36, Defendant denies each and every allegation
17 contained in Paragraph 36.

18 **VI. CLASS ALLEGATION RELATING TO RULE 32 DEFINITION OF CLASS**

19 37. Answering Plaintiff's Paragraph 37, Defendant admits that Plaintiff seeks class
20 certification of the alleged class. To the extent this answer differs from Paragraph 37, Defendant
21 denies each and every rehearing allegation.

22 38. Answering Plaintiff's Paragraph 38, Defendant admits that Plaintiff seeks class
23 certification of the alleged class. Defendant denies the implication that class certification of the class
24 is proper.

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1 39. Answering Plaintiff's Paragraph 39, Defendant admits that Plaintiff seeks class
2 certification of the alleged class. Defendant denies the implication that class certification of the class
3 is proper.

4 40. Answering Plaintiff's Paragraph 40, Defendant admits that Plaintiff seeks class
5 certification of the alleged class. Defendant denies the implication that class certification of the class
6 is proper.

7 41. Answering Plaintiff's Paragraph 41, Defendant admits that Plaintiff seeks class
8 certification of the alleged class. Defendant denies the implication that class certification of the class
9 is proper.

10 42. Answering Plaintiff's Paragraph 42, Defendant admits that Plaintiff seeks class
11 certification of the alleged class. Defendant denies the implication that class certification of the class
12 is proper.

13 43. Answering Plaintiff's Paragraph 43, Defendant admits that Plaintiff seeks class
14 certification of the alleged class. Defendant denies the implication that class certification of the class
15 is proper.

16 44. Answering Plaintiff's Paragraph 44, Defendant admits that on or about March 28,
17 2007, Plaintiff served a letter, characterized as a Pre-litigation Notice, which purported to be
18 transmitted on behalf of a potential class defined as all persons employed by AutoZone within the
19 past six years. The letter demanded that AutoZone cure alleged violations of Oregon wage and hour
20 statutes within 30 days. To the extent that this answer differs from the allegations of Paragraph 44,
21 Defendant denies each and every remaining allegation.

22 45. Answering Plaintiff's Paragraph 45, Defendant denies that it has engaged in unlawful
23 conduct and/or failed or refused to pay wages or penalties due employees. To the extent that this
24 answer differs from the allegations of Paragraph 45, Defendant denies each and every remaining
25 allegation.
26

1 46. Answering Plaintiff's Paragraph 46, Defendant denies that class certification is
2 appropriate and further denies, generally and specifically, that Plaintiff can establish that the putative
3 class meets the requirement of numerosity.

4 47. Answering Plaintiff's Paragraph 47, Defendant denies that class certification is
5 appropriate and further denies, generally and specifically, that Plaintiff can establish that the putative
6 class meets the commonality requirement for class certification. Defendant admits that Defendant's
7 employees are, occasionally, assigned to work in excess of 40 hours in a work week (subparagraph
8 b). To the extent Plaintiff's allegations are legal contentions, no answer is required. Otherwise,
9 Defendant denies generally and specifically, each remaining allegation contained in Paragraph 47.

10 48. Answering Plaintiff's Paragraph 48, Defendant denies that class certification is
11 appropriate and further denies, generally and specifically, that Plaintiff can establish that the putative
12 class meets the typicality requirement for class certification. Defendant denies, generally and
13 specifically, each allegation contained in Paragraph 48.

14 49. Answering Plaintiff's Paragraph 49, Defendant denies that class certification is
15 appropriate and further denies, generally and specifically, that Plaintiff can establish that he is an
16 adequate representative for the putative class and/or that his claims are typical of the alleged claims
17 of other putative class members. Defendant is without knowledge or information relative to
18 counsel's skills and abilities, and therefore denies this allegation.

19 50. Answering Plaintiff's Paragraph 50, Defendant denies that class certification is
20 appropriate and further denies, generally and specifically, that Plaintiff can establish the
21 predominance requirement for class certification or that a class action is superior to other forms of
22 adjudication. To the extent this answer differs from the allegations of Paragraph 50, Defendant
23 denies each and every rehearing allegation.

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VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

51. Answering Plaintiff's Paragraph 51, Defendant incorporates by reference the answers of Paragraphs 1-50 as though fully set forth herein.

52. Answering Plaintiff's Paragraph 52, Defendant contends that the allegations of Paragraph 52 are legal contentions for which no answer is required.

53. Answering Plaintiff's Paragraph 53, Defendant denies each and every allegation contained in Paragraph 53.

54. Answering Plaintiff's Paragraph 54, Defendant denies each and every allegation contained in Paragraph 54.

55. Answering Plaintiff's Paragraph 55, Defendant denies each and every allegation contained in Paragraph 55.

56. Answering Plaintiff's Paragraph 56, Defendant denies each and every allegation contained in Paragraph 56.

57. Answering Plaintiff's Paragraph 57, Defendant contends that no answer is required to the allegations in this paragraph, which purports only to state the remedies Plaintiff is seeking.

58. Answering Plaintiff's Paragraph 58, Defendant contends that no answer is required to the allegations in this paragraph, which purports only to state the remedies Plaintiff is seeking.

SECOND CLAIM FOR RELIEF

59. Defendant incorporates by reference the answers of Paragraphs 1-58 as though fully set forth herein.

60. Answering Plaintiff's Paragraph 60, Defendant contends that the allegations of Paragraph 60 are legal contentions for which no answer is required.

61. Answering Plaintiff's Paragraph 61, Defendant contends that the allegations of Paragraph 61 are legal contentions for which no answer is required.

1 62. Answering Plaintiff's Paragraph 62, Defendant denies each and every allegation
2 contained in Paragraph 62.

3 63. Answering Plaintiff's Paragraph 63, Defendant denies each and every allegation
4 contained in Paragraph 63.

5 64. Answering Plaintiff's Paragraph 64, Defendant denies each and every allegation
6 contained in Paragraph 64.

7 65. Answering Plaintiff's Paragraph 65, Defendant contends that no answer is required to
8 the allegations in this paragraph, which purports only to state the remedies Plaintiff is seeking.

9 66. Answering Plaintiff's Paragraph 66, Defendant contends that no answer is required to
10 the allegations in this paragraph, which purports only to state the remedies Plaintiff is seeking.

11 **THIRD CLAIM FOR RELIEF**

12 67. Defendant incorporates by reference the answers of Paragraphs 1-66 as though fully
13 set forth herein.

14 68. Answering Plaintiff's Paragraph 68, Defendant denies each and every allegation
15 contained in Paragraph 68.

16 69. Answering Plaintiff's Paragraph 69, Defendant denies each and every allegation
17 contained in Paragraph 69.

18 70. Answering Plaintiff's Paragraph 70, Defendant denies each and every allegation
19 contained in Paragraph 70.

20 71. Answering Plaintiff's Paragraph 71, Defendant contends that rehearing allegations of
21 Paragraph 71 are legal contentions for which no answer is required.

22 72. Answering Plaintiff's Paragraph 72, Defendant denies each and every allegation
23 contained in Paragraph 72..

24 73. Answering Plaintiff's Paragraph 73, Defendant contends that no answer is required to
25 the allegations in this paragraph, which purports only to state the remedies Plaintiff is seeking.
26

74. Answering Plaintiff's Paragraph 74, Defendant contends that the allegation is unintelligible and therefore denies the same.

75. Answering Plaintiff's Paragraph 75, Defendant denies each and every allegation contained in Paragraph 75.

76. Answering Plaintiff's Paragraph 76, Defendant contends that no answer is required to the allegations in this paragraph, which purports only to state the remedies Plaintiff is seeking.

FOURTH CLAIM FOR RELIEF

77. Defendant incorporates by reference the answers of Paragraphs 1-76 as though fully set forth herein.

78. Answering Plaintiff's Paragraph 78, Defendant admits that Plaintiff was previously employed by Defendant and that Defendant employed other individuals in the State of Oregon. Defendant denies the implication that class certification is appropriate. To the extent this Answer differs from the allegations in Paragraph 78, Defendant denies each and every remaining allegation.

79. Answering Plaintiff's Paragraph 79, Defendant contends that the allegations of Paragraph 79 are legal contentions for which no answer is required.

80. Answering Plaintiff's Paragraph 80, Defendant admits that it employed Plaintiff and that it employs other individuals in the State of Oregon. Defendant denies the implication that class certification is appropriate. To the extent this Answer differs from the allegations in Paragraph 80, Defendant denies each and every remaining allegation.

81. Answering Plaintiff's Paragraph 81, Defendant admits that it employed Plaintiff and that it employs other individuals in the State of Oregon. Defendant denies the implication that class certification is appropriate. To the extent this Answer differs from the allegations in Paragraph 81, Defendant denies each and every remaining allegation.

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1 82. Answering Plaintiff's Paragraph 82, Defendant contends that the allegations of
2 Paragraph 82 are legal contentions for which no answer is required. Defendant denies the
3 implication that class certification is appropriate.

4 83. Answering Plaintiff's Paragraph 83, Defendant denies each and every allegation
5 contained in Paragraph 83. Defendant denies the implication that class certification is appropriate.

6 84. Answering Plaintiff's Paragraph 84, Defendant denies each and every allegation
7 contained in Paragraph 84. Defendant denies the implication that class certification is appropriate.

8 85. Answering Plaintiff's Paragraph 85, Defendant denies each and every allegation
9 contained in Paragraph 85. Defendant denies the implication that class certification is appropriate.

10 86. Answering Plaintiff's Paragraph 86, Defendant lacks knowledge or information
11 relative to Plaintiff's information and beliefs sufficient to form an opinion regarding the truth or
12 falsity of the allegation, and therefore denies the allegation. Defendant denies the implication that
13 class certification is appropriate.

14 87. Answering Plaintiff's Paragraph 87, Defendant contends that no answer is required to
15 the allegations in this paragraph, which purports only to state the remedies Plaintiff is seeking.
16 Defendant denies the implication that class certification is appropriate.

17 **FIFTH CLAIM FOR RELIEF**

18 88. Defendant incorporates by reference the answers of Paragraphs 1-87 as though fully
19 set forth herein.

20 89. Answering Plaintiff's Paragraph 89, Defendant admits that employees occasionally
21 work in excess of 40 hours in a work week. Defendant denies each and every remaining allegation.
22 Defendant denies the implication that class certification is appropriate.

23 90. Answering Plaintiff's Paragraph 90, Defendant denies each and every allegation
24 contained in Paragraph 90. Defendant denies the implication that class certification is appropriate.

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101. Answering Plaintiff's Paragraph 101, Defendant lacks knowledge or information relative to Plaintiff's information and beliefs sufficient to form an opinion regarding the truth or falsity of the allegation, and therefore denies the allegation. Defendant denies the implication that class certification is appropriate.

102. Answering Plaintiff's Paragraph 102, Defendant denies each and every allegation contained in Paragraph 102. Defendant denies the implication that class certification is appropriate.

103. Answering Plaintiff's Paragraph 103, Defendant contends that no answer is required to the allegations in this paragraph, which purports only to state the remedies Plaintiff is seeking. Defendant denies the implication that class certification is appropriate.

PRAYER FOR RELIEF

Answering Plaintiff's Prayer for Relief, Defendant denies that Plaintiff is entitled to the relief set forth in the prayer for relief, or to any relief whatsoever. Defendant denies the implication that class certification is appropriate.

DEFENSES AND AFFIRMATIVE DEFENSES

BY WAY OF FURTHER ANSWER AND DEFENSE, Defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

104. Plaintiff fails to state any claim:

- (a) for which class-wide relief may be granted;
- (b) for which he may serve as an adequate class representative; and
- (c) for which the Court can award meaningful relief in regard to allegedly missed meal breaks.

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1 **SECOND AFFIRMATIVE DEFENSE**

2 (Actions Taken for Lawful Business Reasons)

3 105. Plaintiff and the putative class members were treated fairly and in good faith and
4 were paid all monies due and/or believed to be due. The amount and calculation of wages paid to
5 Plaintiff and the putative class members were undertaken in accord with lawful business reasons and
6 in good faith.

7 **THIRD AFFIRMATIVE DEFENSE**

8 (Estoppel)

9 106. Plaintiff and the putative class members are estopped, in whole or in part, from
10 claiming additional and/or unpaid compensation by reason of their actions, such as, but not limited
11 to, failing to properly report compensable time.

12 **FOURTH AFFIRMATIVE DEFENSE**

13 (Laches)

14 107. Plaintiff and the putative class members' claims are barred in whole or in part by
15 laches in that they unreasonably delayed in bringing forth their stated claims, to the extent
16 meritorious, and Plaintiff's unreasonable delay caused hardship to AutoZone in defending against the
17 purported claims.

18 **FIFTH AFFIRMATIVE DEFENSE**

19 (Bona Fide Dispute)

20 108. Any wages that are unpaid are the subject of a bona fide, good faith dispute in that
21 AutoZone has paid all wages that it knows or knew were due. Thus AutoZone should not be subject
22 to the imposition of penalties.

23 \\\

24 \\\

25 \\\

1 **SIXTH AFFIRMATIVE DEFENSE**

2 (Failure to Comply with ORCP 32)

3 109. Plaintiff fails to state a claim that meets, substantively, the prerequisites of Oregon
4 Civil Rule 32A and B, and therefore may not maintain this action as a class action lawsuit.

5 **SEVENTH AFFIRMATIVE DEFENSE**

6 (No Private Right of Action)

7 110. Plaintiff's and the putative class members' meal period claims are barred because a
8 private right of action does not exist for such claims pursuant to *Gafur v. Legacy Good Samaritan*
9 *Hospital and Medical Center*, 213 Or. App. 343 (2007).

10 **EIGHTH AFFIRMATIVE DEFENSE**

11 (Pending Claims)

12 111. Plaintiff's and the putative class members' claims are barred in their entirety because
13 their claims are currently pending in another matter, *Joarnt et al. v. AutoZone, Inc.* Moreover,
14 Plaintiff and many of the putative class members in this action are also putative class members in
15 *Joarnt et al. v. AutoZone, Inc.*

16 Defendant AutoZone reserves the right to amend, modify, revise or supplement its Answer,
17 and to plead such further defenses or counterclaims and take such further actions as it may become
18 aware during the course of discovery and/or deem proper and necessary in its defense.

19 **RELIEF REQUESTED BY DEFENDANT**

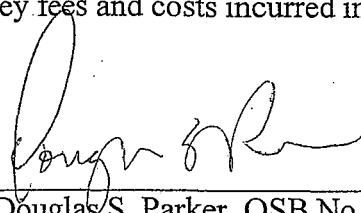
20 WHEREFORE, having fully answered Plaintiff's Complaint, Defendant, AutoZone,
21 respectfully requests that this Court:

- 22 a. Dismiss the Plaintiff's Complaint in its entirety;
23 b. Deny each and every demand, claim and prayer for relief contained in Plaintiff's
24 Complaint;

25 \\\

- 1 c. Grant such other and further relief as the Court may deem just and proper;
2 d. Award AutoZone reasonable attorney fees and costs incurred in the defense of this
3 matter.

4 Dated: March 20, 2008



Douglas S. Parker, OSB No. 82101

dparker@littler.com

Neil N. Olsen, OSB No. 053378

nolsen@littler.com

LITTLER MENDELSON

A Professional Corporation

Attorneys for Defendant Autozone, Inc.

Trial Attorney: Douglas S. Parker

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2008, I served a full, true, and correct copy of the foregoing ANSWER TO COMPLAINT:

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By Laura M. Lucero
Laura Lucero

Firmwide: 84416396.1 013306.2124

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY
08 APR -3 AM 11:54
FILED

ENTERED
APR - 7 2008
IN REGISTER BY EG

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

ORDER ON DEFENDANT'S MOTION
TO CONSOLIDATE AND STAY
PROCEEDINGS

~~PROPOSED~~

THIS MATTER having come before this Court upon Defendant's *Motion to Consolidate and Stay Proceedings*, and having heard oral argument on March 7, 2008, reviewed the file, and being fully advised of the premise thereof, the Court, in addition to its statements on the record, hereby finds: that this cause of action is not identical to *Joarnt v. AutoZone* (Multnomah Co. Case No. 0503-02795) ("*Joarnt*"); neither the class in this cause, nor the class in *Joarnt* has yet been certified; and Plaintiff Migis's right of access to the courts cannot be curtailed.

NOW, THEREFORE,

///

///

1
2 It is therefore HEREBY ORDERED that Defendant's *Motion to Consolidate and Stay*
3 *Proceedings* is DENIED.

4 SIGNED this 2nd day of April 2008.

5
6
7
8 THE HON. JEROME LABARRE
Multnomah Co. Circuit Court

9 APPROVED AS TO FORM:
10
11

12 /s/
A.E. "BUD" BAILEY, OSB NO. 87157
13 bbailey@wagelawyer.com
CHEY K. POWELSON, OSB NO. 03551
14 cpowelson@wagelawyer.com
1498 SE Tech Center Pl, Ste 290
15 Vancouver, WA 98683
Phone: 360.567.2551
16 Fax: 360.567.3331
Attorneys for Plaintiff
17

18
19 /s/
DOUG PARKER, OSB NO. 821017
20 NEIL OLSEN, OSB NO. 053378
LITTLER MENDELSON, P.C.
21 1750 S.W. Harbor Way, Suite 450
Portland, Oregon 97201
22 Phone: 503-221-0309
Fax: 503-242-2457
23 Of Attorneys for Defendant
24
25
26

JM

ENTERED
APR - 7 2008
IN REGISTER BY EG

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY
08 APR -3 AM 11:54
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

ORDER ON PLAINTIFF'S FIRST
MOTION FOR AN ORDER
COMPELLING DISCOVERY, AND
DETERMINING THE SUFFICIENCY
OF DEFENDANT'S RESPONSES TO
PLAINTIFF'S REQUESTS FOR
ADMISSION

~~PROPOSED~~



THIS MATTER having come before this Court upon Plaintiff's *First Motion for an Order Compelling Discovery, and Determining the Sufficiency of Defendant's Responses to Plaintiff's Requests for Admission*, and the Court having heard oral argument on March 7, 2008, reviewed the file, and being fully advised of the premise thereof, for the reasons stated on the record:

It is HEREBY ORDERED that:

- (1) Plaintiff's motion to deem Plaintiff's Requests For Admissions admitted is DENIED.
- (2) Defendant produce all documents in response to Request For Production Nos. 2, 4 and 6 in Plaintiff's First Set of Requests For Production, within 15

business days from the date of hearing on this matter, provided that these Requests shall be limited to Oregon-based AutoZone employees paid on an hourly basis.

(3) Defendant produce all documents responsive to **Request For Production Nos. 7 and 8** in Plaintiff's **Second Set of Requests for Production**, within 15 business days from the date of hearing on this matter.

(4) The parties confer on the scope of production for **Request For Production Nos. 1 - 6** in Plaintiff's **Second Set of Requests For Production**. The Court has subsequently been informed that Plaintiff and Defendant agree to the scope of those Requests as follows, and Defendant shall produce all documents responsive to the Requests, as modified, within 20 business days from the date of hearing on this matter.

(a) **Request No. 1** (transportation and driving policies and/or procedures): The temporal scope of this Request shall be a total of one (1) year comprised of the following time periods: from May 1, 2005 through August 2005; from November 1, 2005 through February 2006; and from May 1, 2006 through August 2006. This Request will be limited to documents representing a complete set of the requested policies and procedures from the earliest date set forth above, through the latest date set forth above, inclusive of any changes to those policies and procedures.

(b) **Request No. 2** (mileage reimbursement policy and/or procedure): The temporal scope of this Request shall be a total of one (1) year comprised of the following time periods: from May 1, 2005 through August 2005; from November 1, 2005 through February 2006; and from May 1, 2006 through

1 August 2006. This Request will be limited to documents representing a
 2 complete set of the requested policies and procedures from the earliest date
 3 set forth above, through the latest date set forth above, inclusive of any
 4 changes to those policies and procedures.

5 (c) **Request No. 3** (merchandise and/or parts delivery and pick-up schedule(s)):

6 No changes; Defendant shall respond to the Request as drafted.

7 (d) **Request No. 4** (documents and reports including Missed Lunch Reports and

8 Lunch Variance Reports): The temporal scope of this Request will be a total
 9 of one (1) year comprised of the following time periods: from May 1, 2005
 10 through August 2005; from November 1, 2005 through February 2006; and
 11 from May 1, 2006 through August 2006.

12 (e) **Request No. 5** (Weekly Schedule reports referencing Plaintiff Migis's

13 approved and unapproved work schedules): No changes; Defendant shall
 14 respond to the Request as drafted.

15 (f) **Request No. 6** (documents and reports reflecting weekly summarization of
 16 hours worked by Plaintiff Migis): No changes; Defendant shall respond to the
 17 Request as drafted.

18
 19
 20 SIGNED on this 2 day of April 2008.

21
 22 
 23 THE HON. JEROME LABARRE
 Multnomah Co. Circuit Court

24 ///

25 ///

26 ///

1 APPROVED AS TO FORM:

2 BAILEY, PINNEY & ASSOCIATES, LLC

3

4 /s/

A.E. "BUD" BAILEY, OSB NO. 87157
bbailey@wagelawyer.com
CHEY K. POWELSON, OSB NO. 03551
cpowelson@wagelawyer.com
1498 SE Tech Center Pl, Ste 290
Vancouver, WA 98683
Phone: 360.567.2551
Fax: 360.567.3331
Attorneys for Plaintiff

9

10

LITTLER MENDELSON

11

12

/s/

DOUG PARKER, OSB NO. 821017
NEIL OLSEN, OSB NO. 053378
LITTLER MENDELSON, P.C.
1750 S.W. Harbor Way, Suite 450
Portland, Oregon 97201
Phone: 503-221-0309
Fax: 503-242-2457
Of Attorneys for Defendant

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Page 4 -

ORDER ON PLAINTIFF'S FIRST MOTION FOR ORDER COMPELLING DISCOVERY

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS,

Plaintiff,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

No. 0711-13531

MOTION PRAECIPE

Notice is hereby given that attorney for Plaintiff has set a motion for hearing as follows:

Judge: Jerome LaBarre	Room: 702
Date: April 8, 2008.	Time: 1:30 p.m.

On Call _____ for _____ in Room 208 at 9:00 a.m.

This is a _____ first _____ subsequent setting.

Length of time requested for this motion hearing: 30 minutes

☐ Moving party waives appearance.

☒ Reporting is requested.

☐ Hearing by telephone is requested.

(Fee is required when motion is filed)

Type of Motion: Enforce Court's Order

I certify that I served a copy of this Praecipe by Fax and Hand Delivery as required by SLR 5.015 on the opposing party as follows:

Messrs. Doug Parker and Neil Olsen
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

DATED April 8, 2008.



CHEY POWELSON, OSB 03551
Of Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

Michael Mijis)
Plaintiff) Case No. 0711-13531
v.)
Autozone, Inc.)
Defendant)

**ORDER RE:
EXPEDITED MOTION HEARING**

Petitioner's request for an expedited setting of the motion to enforce court order for is:

- ☐ Denied, and the underlying motion is returned to petitioner for scheduling in regular course.
- ☐ Denied, with leave to present the underlying motion to the trial judge.
- ☐ Allowed, and underlying motion is _____ without further hearing.
- ☒ Allowed, and underlying motion is assigned to Judge LaBarre for hearing. Petitioner shall contact the assigned judge, in coordination with all necessary parties, to set a date and time.

Date signed: April 4, 2008

Christopher J. Marshall
Signature

Christopher J. Marshall
Name of Judge Typed or Printed

Judge LaBarre heard the underlying motion on
February 7, 2008 @ 9:00 a.m.

Discovery portion is granted expedited basis,
sanctions not to be heard at expedited hearing.

ORDER RE: EXPEDITED HEARING

1

2 IN THE CIRCUIT COURT OF THE STATE OF OREGON

3 FOR THE COUNTY OF MULTNOMAH

4

5

6 MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

8 Plaintiff,

9 vs.

10 AUTOZONE, INC., a Nevada
Corporation,

11 Defendant.

12

No. 0711-13531

**DEFENDANT AUTOZONE, INC.'S
OPPOSITION TO PLAINTIFF'S MOTION
TO ENFORCE COURT ORDER (AS
LIMITED BY JUDGE MARSHALL'S APRIL
4, 2008 ORDER RE: EXPEDITED MOTION
HEARING)**

13

14 Defendant AutoZone, Inc. ("AutoZone") respectfully submits the following Opposition to

15 Plaintiff's Motion to Enforce Court Order (as limited by Judge Marshall's April 4, 2008 Order Re:

16 Expedited Motion Hearing) ("Opposition"). This Opposition is supported by the accompanying

17 Declaration of Neil N. Olsen ("Olsen Decl."), and the pleadings and papers herein.

18 Plaintiff's Motion is without a reason for being. AutoZone has produced all documents in

19 accordance with the subject Court Order, and as Judge Marshall recognized at the hearing on

20 Plaintiff's Petition for an Expedited Hearing, the sanctions Plaintiff seeks do not warrant emergency

21 treatment.¹ See Olsen Decl., Ex. 1. Plaintiff's Motion should further be denied because Plaintiff's

22 counsel failed to properly confer regarding the timing and substance of the motion. If they would

23 have so conferred, they could have avoided an unnecessary expenditure of time and money for all

24 concerned.

25

26 ¹ AutoZone, accordingly, only addresses the document production relief sought by Plaintiff (Item No. 3 from the Motion), and reserves all right to fully oppose sanctions if and when prosecuted.

A. AutoZone has Produced All Documents in Accordance with the Court's March 7, 2008 Rulings and the Order Arising Therefrom.

Disregarding the sanctions pursued by Plaintiff (as ordered by Judge Marshall), the only item of relief sought by Plaintiff now at issue is Item No. 3 from his Motion, which moves the Court to "[o]rder AutoZone to produce all documents responsive to the discovery requests at issue in the Court's prior Order." AutoZone, as of Friday, April 4, produced all such documents. *See Olsen Decl., Ex. 2.*

Indeed, albeit several days late,² AutoZone completed production of all documents required to have been produced by March 28 before the hearing on Plaintiff's Petition for an Expedited Hearing on April 4. *See id., Ex. 3.* Upon inquiry to Plaintiff's counsel as to why they intended to further pursue an expedited hearing, Plaintiff's counsel answered with no specific deficiency in the production, only that they did not "feel that the documents represent full compliance with the Requests/Order." *See id., Ex. 4.*

After receiving the final batch of documents due to them on April 4, Plaintiff pointed to only one perceived deficiency. *See id., Ex. 5.* AutoZone has produced all such documents known to exist. *See id.*

\\

\\

\\

\\

\\

² AutoZone and its counsel has the utmost respect for the Court and its Orders. Leading up to the March 28 due date for certain of the documents responsive to the requests subject to the Court Order, counsel for AutoZone was in Seattle engaged in a week-long arbitration (which was subject to a deposition-heavy compressed discovery schedule in the weeks leading up to the arbitration). Upon learning of deficiencies in the Friday, March 28 production, we communicated to counsel for Plaintiff on Monday, March 31, our recognition of the deficiencies in the production and committed to producing responsive documents as quickly as possible. In addition, we have been engaged in discussions with Plaintiff's counsel regarding the scheduling of depositions of AutoZone representatives and Plaintiff. Discussions that can be characterized as productive and moving the case forward. *See Olsen Decl. ¶ 2.*

B. Plaintiff's Counsel Failed to Properly Confer Before Petitioning the Court for an Expedited Hearing and Filing Plaintiff's Motion.

While counsel for the parties did confer regarding a possible motion to enforce the Court's Order, the substance and timing of Plaintiff's Motion greatly transcends that conferral. The conferral between counsel was limited to the following:

- (1) AutoZone's counsel admitted that its production on Friday, March 28 was not sufficient and committed to make every effort to secure the production of responsive documents as quickly as possible; and
- (2) Plaintiff's counsel indicated that they intended to docket a hearing for a motion to enforce the Court's Order for May 8, but that they would possibly pull the motion off the calendar if documents were produced before adjudication of the motion.

Olsen Decl. ¶ 3, Ex. 6.

Based on the Court's Order and its commitment to Plaintiff's counsel, AutoZone moved diligently forward in the good faith belief that this was the plan of the parties. *Id.* ¶ 4. Without any further conferral, Plaintiff's counsel notified AutoZone's counsel by an email sent at 4:43 p.m., Thursday, April 3, in a "by the way" aside that they would be appearing *ex parte* before the Court at 11:30 a.m. the next day to petition the Court for an expedited hearing on what was simply phrased "Motion to Enforce Court Order." *Id.* ¶ 5, Ex. 7.

Plaintiff's counsel did not provide AutoZone's counsel with a copy of the moving papers until the next day, less than two hours before the scheduled start of the hearing, *see id.*, Ex. 9. It was only at this time that AutoZone's counsel learned that Plaintiff not only sought production of documents, but also a slate of harsh sanctions, all on an expedited basis.

If Plaintiff's counsel would have properly conferred, they could have avoided an unnecessary expenditure of time and money for all concerned.

\\

1 **C. Conclusion.**

2 Based on the foregoing, AutoZone respectfully requests that the Court deny Plaintiff's
3 Motion.

4
5 Dated: April 7, 2008

6 LITTLER MENDELSON, P.C.

7 

8 Douglas S. Parker, OSB No. 821017
9 dparker@littler.com
10 Neil N. Olsen, OSB No. 053378
nolsen@littler.com

11 Of Attorneys for Defendant
12 AutoZone, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2008, I served a full, true, and correct copy of the foregoing DEFENDANT AUTOZONE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO ENFORCE COURT ORDER (AS LIMITED BY JUDGE MARSHALL'S APRIL 4, 2008 ORDER RE: EXPEDITED MOTION HEARING):

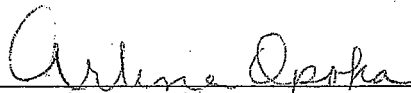
- ☐ By delivery via messenger, or otherwise by hand,
- ☒ By facsimile,
- ☐ By e-mail,
- ☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By


Arlene Opoka

Firmwide:84803851.1 013306.2124

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE, INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DECLARATION OF NEIL N. OLSEN IN
SUPPORT OF DEFENDANT AUTOZONE,
INC.'S OPPOSITION TO PLAINTIFF'S
MOTION TO ENFORCE COURT ORDER
(AS LIMITED BY JUDGE MARSHALL'S
APRIL 4, 2008 ORDER RE: EXPEDITED
MOTION HEARING)**

I, Neil N. Olsen, hereby declare as follows:

1. I am one of the attorneys representing Defendant AutoZone, Inc. ("AutoZone") in the above-captioned matter, and I make this declaration in support of AutoZone's Opposition to Plaintiff's Motion to Enforce Court Order (As Limited by Judge Marshall's April 4, 2008 Order re: Expedited Motion Hearing). I have personal knowledge of the matters stated herein.

2. AutoZone and its counsel has the utmost respect for the Court and its Orders. Leading up to the March 28 due date for certain of the documents responsive to the requests subject to the Court Order, Doug Parker and I were in Seattle engaged in a week-long arbitration (which was subject to a deposition-heavy, compressed discovery schedule in the weeks leading up to the arbitration). Upon learning of deficiencies in the Friday, March 28 production, we communicated to counsel for Plaintiff on Monday, March 31, our recognition of the deficiencies and committed ourselves to securing the production of responsive documents as quickly as possible. In addition, we have been engaged in discussions with Plaintiff's counsel regarding the scheduling of depositions of

1 AutoZone representatives and Plaintiff. Discussions that can be characterized and productive and
2 moving the case forward.

3 3. While counsel for the parties did confer regarding a possible motion to enforce the
4 Court's Order, the substance and timing of Plaintiff's Motion greatly transcends that conferral. The
5 conferral between counsel was limited to the following:

6 (A) AutoZone's counsel admitted that its production on Friday, March 28 was not
7 sufficient and committed to make every effort to secure the production of responsive
8 documents as quickly as possible; and

9 (B) Plaintiff's counsel indicated that they intended to docket a hearing for a motion to
10 enforce the Court's Order for May 8, but that they would possibly pull the motion off
11 the calendar if documents were produced before adjudication of the motion.

12 4. Based on the Court's Order and its commitment to Plaintiff's counsel, AutoZone
13 moved diligently forward in the good faith belief that this was the plan of the parties.

14 5. Without any further conferral, Plaintiff's counsel notified AutoZone's counsel by an
15 email sent at 4:43 p.m., Thursday, April 3, in a "by the way" aside that they would be appearing *ex*
16 *parte* before the Court at 11:30 a.m. the next day to petition the Court for an expedited hearing on
17 what was simply phrased "Motion to Enforce Court Order." Attached hereto as Exhibit 7 is a true
18 and correct copy of an April 3, 2007 email from Chey Powelson to Neil N. Olsen.

19 6. Plaintiff's counsel did not provide AutoZone's counsel with a copy of the moving
20 papers until the next day, less than two hours before the scheduled start of the hearing. It was only at
21 this time that AutoZone's counsel learned that Plaintiff not only sought production of documents,
22 but also a slate of harsh sanctions, all on an expedited basis.

23 7. Attached hereto as Exhibit 1 is a true and correct copy of Judge Marshall's April 4,
24 2008 Order Re: Expedited Motion Hearing .

1 8. Attached hereto as Exhibit 2 is a true and correct copy of an April 4, 2008 email from
2 Neil N. Olsen to Chey Powelson.

3 9. Attached hereto as Exhibit 3 is a true and correct copy an April 4, 2008 email from
4 Neil N. Olsen to Chey Powelson.

5 10. Attached hereto as Exhibit 4 is a true and correct copy an April 4, 2008 email from
6 Chey Powelson to Neil N. Olsen.

7 11. Attached hereto as Exhibit 5 is a true and correct copy of an April 7, 2008 email from
8 Neil N. Olsen to Chey Powelson.

9 12. Attached hereto as Exhibit 6 is a true and correct copy of an April 7, 2008 email from
10 Neil N. Olsen to Chey Powelson.

11 **I declare that the above statements are true to the best of my knowledge and belief, and**
12 **that I understand that it is made for use as evidence in court and is subject to penalty for**
13 **perjury.**

14 Dated: April 7, 2008

15
16 
17 _____
18 Neil N. Olsen
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2008, I served a full, true, and correct copy of the foregoing
DECLARATION OF NEIL N. OLSEN IN SUPPORT OF DEFENDANT AUTOZONE,
INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO ENFORCE COURT ORDER (AS
LIMITED BY JUDGE MARSHALL'S APRIL 4, 2008 ORDER RE: EXPEDITED MOTION
HEARING).

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By



Neil N. Olsen, OSB No. 053778

nolsen@littler.com

LITTLER MENDELSON

A Professional Corporation

Of Attorneys for Defendant
AutoZone, Inc.

Firmwide:84807732.1 013306.2124

Olsen, Neil N.

From: Olsen, Neil N.
Sent: Friday, April 04, 2008 4:56 PM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: AutoZone/Migis
Attachments: Autozone RRFP 1220 - 1235.pdf; Autozone RRFP 1253 - 1288.pdf; Autozone RRFP 1236 - 1252.pdf; Autozone RRFP 1289 - 1346.pdf

Chey,

Please find attached additional documents responsive to your requests related to item (4) from the Court's Order. They include documents responsive to Request Nos. 2, 4, and 6 from your Second Set of RFPs. We have previously produced to you documents responsive to Request Nos. 1 and 6 from your Second Set of RFPs. No documents exist responsive to your Request Nos. 3 and 5 from your Second Set of RFPs.

In addition, we have previously produced documents responsive to your requests related to items (2) and (3) from the Court's Order.

We have now produced all documents required by the Court's Order.

Regards,
Neil

Neil N. Olsen
Littler Mendelson, P.C.
1750 SW Harbor Way, Ste. 450
Portland, OR 97201
Main: 503.221.0309
Direct: 503.889.8882
Cell: 503.807.8505
Fax: 503.242.2457
nolsen@littler.com

Exhibit	<u>2</u>
Page	<u>1</u> of <u>1</u>

4/7/2008

Olsen, Neil N.

From: Olsen, Neil N.
Sent: Friday, April 04, 2008 9:49 AM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: AutoZone/Migis
Attachments: Autozone RRF 1212 - 1219.pdf

Chey,

Please find attached documents responsive to the RFPs related to the First, Second, and Third RFAs from your first set of discovery requests.

You now have all documents relating to items (2) and (3) from the Court's Order on your motion to compel. I believe this obviates the hearing you have noted for 11:30 today.

I intend to forward you later today additional documents/responses relating to item (4) from the Court's Order.

Please let me know as soon as possible whether you still intend to appear at the 11:30 hearing. If so, please provide me a copy of your moving papers as we discussed yesterday evening.

Best regards,
Neil

Neil N. Olsen
Littler Mendelson, P.C.
1750 SW Harbor Way, Ste. 450
Portland, OR 97201
Main: 503.221.0309
Direct: 503.889.8882
Cell: 503.807.8505
Fax: 503.242.2457
nolsen@littler.com

Exhibit	<u>3</u>
Page	<u>1</u> of <u>1</u>

4/7/2008

Olsen, Neil N.

From: Chey Powelson [cpowelson@wagelawyer.com]
Sent: Friday, April 04, 2008 10:29 AM
To: Olsen, Neil N.
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.; Brad Griffin; Charity Shindle
Subject: RE: AutoZone/Migis

Even setting aside the reasons set forth in the Motion to Enforce, we don't feel that the documents represent full compliance with the Requests/Order.

From: Olsen, Neil N. [mailto:NOlsen@littler.com]
Sent: Friday, April 04, 2008 10:19 AM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: RE: AutoZone/Migis

Chey,

On what basis do you intend to move forward with the hearing? We have produced the relevant documents.

Neil

Neil N. Olsen
Littler Mendelson, P.C.
1750 SW Harbor Way, Ste. 450
Portland, OR 97201
Main: 503.221.0309
Direct: 503.889.8882
Cell: 503.807.8505
Fax: 503.242.2457
nolsen@littler.com

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Friday, April 04, 2008 10:13 AM
To: Olsen, Neil N.
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.; Charity Shindle; Brad Griffin
Subject: RE: AutoZone/Migis

Plaintiff will still be appearing today at 11:30, and we faxed you a copy of the petition and underlying motion/declaration a bit ago.

From: Olsen, Neil N. [mailto:NOlsen@littler.com]
Sent: Friday, April 04, 2008 9:49 AM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: AutoZone/Migis

Chey,

4/4/2008

Exhibit	4
Page	1 of 3

Please find attached documents responsive to the RFPs related to the First, Second, and Third RFAs from your first set of discovery requests.

You now have all documents relating to items (2) and (3) from the Court's Order on your motion to compel. I believe this obviates the hearing you have noted for 11:30 today.

I intend to forward you later today additional documents/responses relating to item (4) from the Court's Order.

Please let me know as soon as possible whether you still intend to appear at the 11:30 hearing. If so, please provide me a copy of your moving papers as we discussed yesterday evening.

Best regards,
Neil

Neil N. Olsen
Littler Mendelson, P.C.
1750 SW Harbor Way, Ste. 450
Portland, OR 97201
Main: 503.221.0309
Direct: 503.889.8882
Cell: 503.807.8505
Fax: 503.242.2457
nolsen@littler.com

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Littler Mendelson, P.C.

<http://www.littler.com>

Olsen, Neil N.

From: Olsen, Neil N.
Sent: Monday, April 07, 2008 3:28 PM
To: 'Chey Powelson'
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: RE: AutoZone/Migis

Chey,

We have produced existing, responsive documents.

Regards,
Neil

Neil N. Olsen
Littler Mendelson, P.C.
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Portland, OR 97201
Main: 503.221.0309
Direct: 503.889.8882
Cell: 503.807.8505
Fax: 503.242.2457
nolsen@littler.com

From: Chey Powelson [<mailto:cpowelson@wagelawyer.com>]
Sent: Friday, April 04, 2008 5:17 PM
To: Olsen, Neil N.
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.; Brad Griffin; Charity Shindle
Subject: RE: AutoZone/Migis

Bates No. 0001335 is a weekly schedule, which is responsive to Plaintiff's: RFP No. 6 (Second Set) ("Produce all documents and reports reflecting any weekly summarization of hours worked by Plaintiff, whether individually or by inclusion in a larger group, for the period of time from three (3) years prior to the filing of the Complaint, up to present."); and RFP No. 14 (First Set) ("Produce all documents and electronically stored information evidencing the hours Plaintiff worked or was expected to work individually or by inclusion in a larger group for Defendant, including, but not limited to, all of Plaintiff's time records, time cards, punch clock records, time sheets, work time schedules and any data compilations from which information can be obtained or translated, if necessary, by Defendant through detection devices into reasonably usable form.").

Please produce the rest of his work schedules, both approved and unapproved. Thanks.

From: Olsen, Neil N. [<mailto:NOlsen@littler.com>]
Sent: Friday, April 04, 2008 4:56 PM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.

Exhibit	<u>5</u>
Page	<u>1</u> of <u>2</u>

4/7/2008

Subject: AutoZone/Migis

Chey,

Please find attached additional documents responsive to your requests related to item (4) from the Court's Order. They include documents responsive to Request Nos. 2, 4, and 6 from your Second Set of RFPs. We have previously produced to you documents responsive to Request Nos. 1 and 6 from your Second Set of RFPs. No documents exist responsive to your Request Nos. 3 and 5 from your Second Set of RFPs.

In addition, we have previously produced documents responsive to your requests related to items (2) and (3) from the Court's Order.

We have now produced all documents required by the Court's Order.

Regards,
Neil

Neil N. Olsen
Littler Mendelson, P.C.
1750 SW Harbor Way, Ste. 450
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4/7/2008

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Olsen, Neil N.

From: Olsen, Neil N.
Sent: Monday, April 07, 2008 3:19 PM
To: 'Chey Powelson'
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: FW: AutoZone/Migis

Chey,

Doug forwarded me your email regarding our conferral and lack thereof. It is not well taken.

Yes, we did confer regarding you possibly filing a motion to enforce the order to be heard on May 8. We also discussed the fact that my side was working with all diligence to produce the remaining documents owed to you, and that possibly such a motion would be mooted by our efforts. You needed to get your motion on the calendar and we needed to produce the documents. That was the extent of our conversation.

You at no time before your email of 4:43 p.m. on April 3 (the day before the hearing on your petition) indicated an intention to move for an expedited hearing. You at no time before we received a copy of your motion shortly before 10:00 a.m. April 4 (approximately two hours before the hearing on your petition) indicated the possibility of seeking the harsh sanctions you now apparently intend to pursue. The timing and substance of your motion greatly transcended our conferral.

Finally, regarding the statement Mr. Bailey made to Judge Marshall at the hearing on your petition that the May 8 date was lost because of something we did or did not do, as you are aware, the truth is somewhat different. You specifically advised me (after I called you following receipt your 4:43 p.m. email) that at the time you requested the May 8 hearing date Judge LeBarre had not yet signed the Order and, thus, his clerk would not give you a hearing date; that after the Order was signed, the May 8 date was unavailable. Perhaps Mr. Bailey was under some misunderstanding.

Regards,
Neil

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Cell: 503.807.8505
Fax: 503.242.2457
nolsen@littler.com

From: Chey Powelson [<mailto:cpowelson@wagelawyer.com>]
Sent: Friday, April 04, 2008 3:46 PM
To: Parker, Douglas S.
Cc: Bud Bailey; Brad Griffin; Charity Shindle
Subject: FW: AutoZone/Migis

In light of the below e-mail, I strongly urge Defendant to refrain from representing to the Court that there was no conferral on the Motion to Enforce Court Order (despite Defendant twice today telling

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Page	1 of 5

4/7/2008

Judge Marshall there was no conferral).

Chey Powelson

From: Olsen, Neil N. [mailto:NOlsen@littler.com]
Sent: Thursday, April 03, 2008 12:54 PM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: RE: AutoZone/Migis

Chey,

Yes, we are working diligently to compile responsive documents. Yes, we have conferred regarding you filing a motion to enforce the order.

Yes, I will provide you an update on other issues you raised.

Regarding depositions of AutoZone personnel, I do recall you mentioning your desire to take ORCP 39C(6) depositions. I think it is fine to pencil in May 14 to 16 for all of them, including the IT-type deposition (I assume most if not all will be in Memphis, so we will want to consolidate travel as I assume will you), but we will need you to describe with reasonable particularity the matters on which examination is requested so that we may determine the most appropriate designee. Perhaps draft notices would be appropriate. Once we determine the designee for each area, we can better nail down a schedule. Are Messrs. Dessem and Massey persons who you believe we will designate? We will need to work out the scope of the deposition regarding Affirmative Defenses.

Regarding Mr. Migis's deposition, we are willing to depose him after your ORCP 39C(6) depositions. How does May 20 or 21 look?

I will address your native format request by next week.

Best regards,
Neil

Neil N. Olsen
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Cell: 503.807.8505
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nolsen@littler.com

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Tuesday, April 01, 2008 6:04 PM
To: Olsen, Neil N.
Cc: Bud Bailey; Brad Griffin; Dana Pinney; Charity Shindle
Subject: RE: AutoZone/Migis

Neil:

As discussed this afternoon via telephone, Defendant is working on compiling documents relating to the

Exhibit	6
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4/7/2008

matters addressed in the Court's order on Plaintiff's First motion to compel discovery. Because Defendant is unable to provide a date certain by which all the documents will be produced, Plaintiffs will file a motion to enforce that order, to be heard on or about May 8. I'll let you know if that date changes.

As for the outstanding issues set forth in my March 19 letter (conferred upon on March 18 and 19), you'll provide an update by this Friday as to other anticipated document production (Friday as you know is also the deadline for other matters in the Court order from the March 7, 2008 ruling). I let you know that for certain issues in the March 19 letter (i.e., "individually or by inclusion in a larger group"), I considered that Defendant already issued its final position on those discovery requests. (However, keep in mind these Requests also seek work schedules with Migis and other employees. Those employees would also be fact witnesses.)

[You should further note that, as I mentioned on prior occasions though not today, Defendant should produce all of Plaintiff's work schedules, as I have not yet seen any produced. There may be several different types of schedules, including those specifically referencing rest breaks, etc.]

Today I also mentioned Plaintiff wants to begin taking depositions, including those of Mark Dessem and Mr. Massey (or his title-equivalent successor, if he's not there anymore) and an ORCP 39C(6) deposition regarding Defendant's affirmative defenses, beginning on or about May 14-16. Messrs. Dessem and Massey should take a day total.

You'll get back to me with Defendant's availability, but expressed some concern about the scope of that 39C(6) deposition including testimony on affirmative defenses not relating to class certification. I speculated we may be able to agree on a narrower scope, or that otherwise such an issue may be addressed in a case management conference with Judge LaBarre, once we send you a proposed case management order and schedule that hearing with the Court. (Please also keep in mind, however, that since we're well into the case now, Plaintiff's position as to the affirmative defenses may be that contention discovery is proper, and so testimony should be taken on all the affirmative defenses at once.)

You mentioned Defendant's desire to take Mr. Migis's deposition sooner rather than later, and probably before Plaintiff's depositions referenced above. I asked you to provide me with dates and times.

I also mentioned the possibility of an earlier 39C(6) deposition relating to the creation, storage, transmission, review, use, and disposition of information relating to hours worked by Oregon hourly AutoZone employees (putative class members). Please advise whether April 14 will work on your end. I also put you on notice during the phone conversation of my faxed letter to you today regarding Plaintiff's preference for production of employee time records in usable/native electronic format, not .pdf format, which will facilitate the briefing on class certification.

Chey

From: Chey Powelson
Sent: Tuesday, April 01, 2008 2:07 PM
To: 'Olsen, Neil N.'
Cc: Bud Bailey; Brad Griffin; Dana Pinney; Charity Shindle
Subject: FW: AutoZone/Migis

Neil:

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Page	3 of 5

4/7/2008

What's Defendant's final position on the issues set forth in the attached letter from March 19? We'd agreed on a March 28 response date, so unless I hear otherwise soon, I'll assume there's nothing more to produce.

Chey

From: Chey Powelson
Sent: Wednesday, March 19, 2008 5:53 PM
To: 'Olsen, Neil N.'
Cc: Parker, Douglas S.; Tift, Leigh Ann C.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: AutoZone/Migis

Neil:

See attached letter, also to arrive via Fax.

From: Olsen, Neil N. [mailto:NOlsen@littler.com]
Sent: Wednesday, March 19, 2008 10:37 AM
To: Chey Powelson
Cc: Parker, Douglas S.; Tift, Leigh Ann C.
Subject: AutoZone/Migis

Chey,

It was good speaking with you yesterday and today regarding Plaintiff's First Set of Requests for Production.

As we discussed, you will provide correspondence confirming your narrowing of certain requests and my offer to follow up with my client regarding certain others.

As we further discussed, while the narrowing of requests during conferral is appropriate in certain circumstances, I do not intend to move forward in a mode in which Plaintiff propounds grossly overbroad and unduly burdensome discovery requests, we rightfully object, and then under the guise of conferral on a motion to compel Plaintiff brings his requests to within reason. It is the obligation of the propounding party to construct discovery requests out of the gate which fall within the boundaries of allowable discovery. It is not the job of the responding party to divine from an overbroad request what it should produce. Conferral should be reserved for those situations in which the propounding party truly believes it has set forth a proper discovery request that is not being met with a proper response.

As to the general issues you raised in your March 11, 2008 letter:

(1) Plaintiff raised the waiver argument in its motion to compel. The Court did not take it up and Plaintiff did not press the issue at the hearing. Considering the circumstances of the surrounding motion practice and the Court's order on the Requests for Admissions, we do not believe AutoZone waived its objections of overbreadth and undue burden; and

(2) The Oregon Rules do not support your request for a signed verification that no additional documents exist to specific requests. As we are doing in the current situation, if you believe additional documents may exist after receiving a production of documents and communicate that belief and the basis therefore to us, we will check with AutoZone to ensure that all responsive documents have been produced. Signed verification is neither required nor necessary.

Best regards,
Neil

Exhibit	6
Page	4 of 5

4/7/2008

Neil N. Olsen
Littler Mendelson, P.C.
1750 SW Harbor Way, Ste. 450
Portland, OR 97201
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<http://www.littler.com>

Olsen, Neil N.

From: Chey Powelson [cpowelson@wagelawyer.com]
Sent: Thursday, April 03, 2008 4:43 PM
To: Olsen, Neil N.
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.; Brad Griffin; Charity Shindle
Subject: RE: AutoZone/Migis

Then I'll send out 39C(6) notices. We can then confer and try to stipulate to changes, if necessary, and reflect those stipulations in an amended notice.

Also, please be advised Plaintiff will appear tomorrow at 11:30 in Judge Marshall's courtroom (312) for hearing on Plaintiff's petition for expedited hearing on Motion to Enforce Court Order. Chey

From: Olsen, Neil N. [mailto:NOlsen@littler.com]
Sent: Thursday, April 03, 2008 3:46 PM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: RE: AutoZone/Migis

Chey,

First, I don't know that Massey and Dessem would be subject to individual deposition notices. In other words, a subpoena may technically be necessary to compel their attendance at a deposition. I will have to check their position and conduct a managing agent analysis. In any event, I'm not saying a subpoena will be necessary, but something we should keep in mind. Your thoughts on that front are welcome.

Second, I assume we are still talking about draft notices. The dates as I mentioned are not set in stone. We need to review your proposed areas of inquiry, determine who is best suited to appear, and coordinate with their schedule.

Best regards,
Neil

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Portland, OR 97201
Main: 503.221.0309
Direct: 503.889.8882
Cell: 503.807.8505
Fax: 503.242.2457
nolsen@littler.com

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Thursday, April 03, 2008 1:08 PM
To: Olsen, Neil N.
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.; Brad Griffin; Charity Shindle
Subject: RE: AutoZone/Migis

Exhibit	7
Page	1 of 6

4/4/2008

The Massey and Dessem depositions would be notices to depose them individually, not per 39C(6)—you can designate whomever and how ever many people as you want for those. The 39C(6) depositions would be on the affirmative defenses, as well as (possibly,) IT/EIS-related topics. Will send 39C(6) notices, and am leaning to May 15 and 16. The location of the depositions we can discuss in a day or two, as well as what would constitute proper objections during the 39C(6) deps. Will check with Mr. Migis and the people here re: availability on May 20 or 21.

From: Olsen, Neil N. [mailto:NOlsen@littler.com]
Sent: Thursday, April 03, 2008 12:54 PM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: RE: AutoZone/Migis

Chey,

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Yes, I will provide you an update on other issues you raised.

Regarding depositions of AutoZone personnel, I do recall you mentioning your desire to take ORCP 39C(6) depositions. I think it is fine to pencil in May 14 to 16 for all of them, including the IT-type deposition (I assume most if not all will be in Memphis, so we will want to consolidate travel as I assume will you), but we will need you to describe with reasonable particularity the matters on which examination is requested so that we may determine the most appropriate designee. Perhaps draft notices would be appropriate. Once we determine the designee for each area, we can better nail down a schedule. Are Messrs. Dessem and Massey persons who you believe we will designate? We will need to work out the scope of the deposition regarding Affirmative Defenses.

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Best regards,
Neil

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Neil:

Exhibit	7
Page	2 of 4

4/4/2008

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From: Chey Powelson
Sent: Tuesday, April 01, 2008 2:07 PM
To: 'Olsen, Neil N.'
Cc: Bud Bailey; Brad Griffin; Dana Pinney; Charity Shindle
Subject: FW: AutoZone/Migis

Exhibit	1
Page	3 of 4

4/4/2008

Neil:

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Chey

From: Chey Powelson
Sent: Wednesday, March 19, 2008 5:53 PM
To: 'Olsen, Neil N.'
Cc: Parker, Douglas S.; Tift, Leigh Ann C.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: AutoZone/Migis

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Cc: Parker, Douglas S.; Tift, Leigh Ann C.
Subject: AutoZone/Migis

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As we further discussed, while the narrowing of requests during conferral is appropriate in certain circumstances, I do not intend to move forward in a mode in which Plaintiff propounds grossly overbroad and unduly burdensome discovery requests, we rightfully object, and then under the guise of conferral on a motion to compel Plaintiff brings his requests to within reason. It is the obligation of the propounding party to construct discovery requests out of the gate which fall within the boundaries of allowable discovery. It is not the job of the responding party to divine from an overbroad request what it should produce. Conferral should be reserved for those situations in which the propounding party truly believes it has set forth a proper discovery request that is not being met with a proper response.

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(1) Plaintiff raised the waiver argument in its motion to compel. The Court did not take it up and Plaintiff did not press the issue at the hearing. Considering the circumstances of the surrounding motion practice and the Court's order on the Requests for Admissions, we do not believe AutoZone waived its objections of overbreadth and undue burden; and

(2) The Oregon Rules do not support your request for a signed verification that no additional documents exist to specific requests. As we are doing in the current situation, if you believe additional documents may exist after receiving a production of documents and communicate that belief and the basis therefore to us, we will check with AutoZone to ensure that all responsive documents have been produced. Signed verification is neither required nor necessary.

Best regards,

4/4/2008

Exhibit	7
Page	4 of 6

Neil

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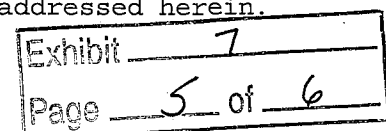
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4/4/2008

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**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, et al.,

Plaintiffs,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

Case No. 0711-13531

**REPLY SUPPORTING PLAINTIFF'S
MOTION TO ENFORCE COURT
ORDER**

PLAINTIFF hereby submits this *Reply* in support of his *Motion to Enforce Court Order*, and requests the Court enforce its prior order requiring Defendant AutoZone to produce all documents responsive to Plaintiff's Requests for Production 2, 4, and 6, and which were to support Defendant's denials to Plaintiff's Requests For Admission 1 - 3. Defendant has not complied with that prior Order.

A. AutoZone "Document Production"

AutoZone produced one type of document in response to Requests For Production 2, 4 and 6, but only after receiving notice that Plaintiff intended to move on an expedited basis to enforce the prior Order. See *Reply Declaration of Chey K. Powelson*, Ex. A.

By producing Exhibit A, AutoZone now represents it relied only upon that document to deny Plaintiff's Requests For Admissions 1 - 3. A fundamental flaw is that Exhibit A refutes

PLAINTIFF'S MOTION TO ENFORCE COURT ORDER ON PLAINTIFF'S FIRST MOTION TO COMPEL DISCOVERY, AND DETERMINING THE SUFFICIENCY OF DEFENDANT'S RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSION

1 those denials.

2 Another fundamental flaw with Exhibit A is that Plaintiff requested “all documents and
3 electronically stored information” for the employees at issue. Plaintiff comprehensively defined
4 “Documents” and “Electronic Data” in its discovery requests. *Reply Decl.*, Ex. B. AutoZone
5 ignored those definitions, and instead produced some data in non-native, .pdf format. *Id.*, Ex. A.

6 During the hearing on Plaintiff’s motion to compel, Defendant’s counsel represented that
7 responding to Requests For Production 2, 4 and 6 “requires considerable digging[.]” *Reply Decl.*,
8 Ex. C.¹

9 1. Request For Production No. 1 (Involuntarily Terminated Employees)

10 The first line (“record”) on Exhibit A (Employee ID 10004509) refutes Defendant’s denial
11 to **RFA No. 1**. It reflects an employee involuntarily terminated for violation of company policy
12 (Reason “B3”) on August 27, 2007, and whose final paycheck was dated September 14, 2007.
13 *Reply Decl.*, Ex. A. Under Oregon law, that paycheck was due no later than one (1) business day
14 after the termination. ORS 652.140(1). Instead, the check was dated for a scheduled payday
15 (Friday), approximately 17 calendar days past due.

16 Another involuntarily terminated employee (ID 10295566) on page one of Exhibit A
17 purportedly shows that while the employee’s last day was September 6, 2007, the final check was
18 not dated until September 28, 2007. *Reply Decl.*, Ex. A. This person’s final pay check was late
19 by approximately 21 days.

20 2. Request For Admission No. 2 (Employees Who Quit with Notice)

21 An employee who quit with notice (Employee ID 10165628; Reason “A1”) on Exhibit
22 A refutes Defendant’s denial of Plaintiff’s **RFA No. 2**. That employee quit with notice and had
23 a last day worked of May 12, 2007, but his or her final paycheck was dated May 16, 2007. *Reply*
24

25 ¹ Defendant did not timely object to Plaintiff’s requests on the grounds that they were
26 unduly burdensome or overly broad.

1 Decl., Ex. A. Under Oregon law, that paycheck was “due and payable immediately[.]” ORS
2 652.140(2)(a).

3 Two other employees in this category (Employee ID nos. 10310478 and 10311813) on
4 page one of Exhibit A had final paychecks dated, respectively, seven calendar days (ID
5 10310478) and 16 calendar days (10311813) after their last dates worked. *Reply Decl.*, Ex. A.

6 3. Request For Admission No. 3 (Employees Who Quit Without Notice)

7 Exhibit A also undermines Defendant’s denial to **RFA No. 3** regarding employees who
8 quit without notice. For example, Employee 10313503 (p. 1) apparently quit without notice on
9 May 2, 2007, but their final paycheck was dated May 11, 2007. *Reply Decl.*, Ex. A. Under
10 Oregon law, that paycheck was due and payable within five (5) business days of May 2, 2007,
11 which was May 9, 2007. Another employee who quit without notice (Employee ID 10337265)
12 on page two of Exhibit A shows a last day of February 14, 2007, but a check date of March 2,
13 2007. The check was therefore approximately eight calendar days late.

14 Because Exhibit A refutes Defendant’s denials,² AutoZone cannot possibly have produced
15 all documents upon which it relied to make those denials. Defendant’s counsel had an affirmative
16 duty in the first instance to deny only after making a reasonable inquiry into the matter.
17 Defendant failed to produce all responsive documents pursuant to the Court Order.³

18
19
20 ² Those denials have caused substantial cost to Plaintiff’s counsel (Petition for Expedited
21 hearing for *Motion to Compel*, hearing on *Motion to Compel*, *Motion to Enforce Order*, and
22 associated time), and therefore for purposes of the sanctions portion of the *Motion*, presumably
to be heard in the normal course, Plaintiff will in the alternative request the Court for alternative
relief under ORCP 46C.

23 ³ Either that, or Defendant made the denials in bad faith, *i.e.*, with the intent to further
24 delay adjudication of this lawsuit. If Defendant’s counsel adheres to the position that it has,
25 under all circumstances, complied with the Court Order by producing Exhibit A, Plaintiff
26 requests that: (a) Defendant be precluded from objecting on any grounds to the admission of
Exhibit A into the court record; and (b) Defendant produce all necessary deponents or designees
solely at its own expense here in Oregon, to testify as to the content and all aspects of Exhibit A.

1 **B. Defendant's Non-Production by the Court-Ordered Deadline Was in Bad Faith**

2 It bears repeating that Defendant's non-production in response to Requests For Production
 3 2, 4 and 6 by the Court-ordered deadline was as follows: "With respect to Plaintiff Migis,
 4 Defendant maintains that Plaintiff has all relevant documents; to wit, Plaintiff's final paycheck
 5 and Plaintiff's personnel file reflecting the date his employment ended with AutoZone."
 6 (emphasis added).

7 This was a bad faith response. Plaintiff Migis's employment ended *outside the time frame*
 8 set forth in the discovery requests at issue. Only at Plaintiff's immediate prompting did
 9 Defendant commit to producing all responsive documents at some un-specified date after the
 10 deadline.

11 Coincidentally, Defendant's production occurred closer to the 30 calendar day mark
 12 Defendant's counsel requested during the prior hearing, but which this Court expressly refused.

13
 14 **C. Conferral on the Motion to Enforce Court Order**

15 Defendant now attempts to argue there was no conferral because there was no agreed-
 16 upon date (five to six weeks out) for a hearing. Conferring on a hearing date is not required.

17 The parties twice conferred via telephone on Defendant's non-production by the deadline
 18 set forth in the Order. See *Powelson Declaration* supporting *Motion to Enforce Court Order*.
 19 During those conferences, AutoZone's counsel could not provide a date certain by which
 20 production would occur, and speculated it could be that next week (April 8 - 10).

21 Also during those conferences, Defendant's counsel acknowledged Plaintiff would be
 22 filing a motion to enforce the Court Order. Plaintiff's counsel immediately confirmed in a March
 23 31, 2008 follow-up e-mail to the first conference that the parties had conferred on the necessity
 24 of filing a motion, and that Plaintiff would be drafting it. See *Olsen Declaration*, Ex. 7 (p. 3).
 25 Mr. Olsen responded, "Yes, we have conferred regarding your filing a motion to enforce the

26
 Page 4-

PLAINTIFF'S MOTION TO ENFORCE COURT ORDER ON PLAINTIFF'S FIRST MOTION TO COMPEL
 DISCOVERY, AND DETERMINING THE SUFFICIENCY OF DEFENDANT'S RESPONSES TO
 PLAINTIFF'S REQUESTS FOR ADMISSION

1 order." *Id.*, Ex. 7 (p. 2).

2 It now appears Defendant was content in letting Plaintiff draft and file the *Motion to*
3 *Enforce Court Order*, but only if the hearing was at least six weeks out. Presumably at the time
4 of hearing, Defendant would argue it had produced everything.

5 That Defendant feigns surprise at the actual content of Plaintiff's *Motion* is not a basis to
6 renege on counsel's confirmation of the prior conferral. The *Motion* expressly relates to
7 Defendant's failure to obey a court order and failure to produce all documents requested. Rule
8 46 governs the procedure relating to such failures, and section B clearly lists the available
9 sanctions.

10 Finally, AutoZone concedes it did not comply with the Court Order.⁴ It cannot undo that
11 prior failure, and the legal arguments in Plaintiff's *Motion to Enforce* relate to such failures and
12 the resulting prejudice to the judicial system, regardless of whether there is eventual compliance.
13 See Plaintiff's *Motion*, pp. 7 - 9.

14 **D. Conclusion**

15 For all the reasons set forth in this Reply and Plaintiff's *Motion to Enforce Court Order*
16 Plaintiff requests that Defendant produce all documents as the Court Order states. Plaintiff also
17 requests the opportunity to submit supplemental briefing in support of that *Motion*, the hearing
18 on which could occur should this Court decide to schedule a case management conference for
19 May 2008.

20 SIGNED this 8th day of April 2008. BAILEY, PINNEY & ASSOCIATES, LLC

21 
22 A.E. "BUD" BAILEY, OSB 87157
23 CHEY POWELSON, OSB 03551
24 Of Attorneys for Plaintiffs

25 ⁴ During the hearing on the *Motion to Compel*, the Court declined to accept Defendant
26 counsel's prior request for additional time (30 calendar days) due to an arbitration, so it is
improper for Defendant to again raise it in response to the instant *Motion to Enforce Court Order*.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Reply Supporting Plaintiff's Motion to Enforce Court Order** upon:


Messrs. Doug Parker and Neil Olsen
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be **hand-delivered** to the person listed above on the date set forth below.

☒ by **faxing** a full, true, and correct copy thereof to the person at facsimile number 503-961-7854, which is the last-known fax number for the person, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed. Attached herewith is the confirmation of receipt which was generated by the transmitting machine.

DATED: April 8, 2008



CHEY POWELSON, OSB 03551
Of Attorneys for Plaintiff

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7 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
8 **FOR THE COUNTY OF MULTNOMAH**
9

10 **MICHAEL MIGIS, et al.,**

11 Plaintiff,

12 v.

13 **AUTOZONE, INC.,**

14 Defendant.
15
16

Case No. 0711-13531

**REPLY DECLARATION OF
CHEY K. POWELSON
SUPPORTING PLAINTIFF'S
MOTION TO ENFORCE COURT
ORDER ON FIRST MOTION FOR
AN ORDER COMPELLING
DISCOVERY**

17 I, Chey K. Powelson, hereby declare as follows:

- 18 1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter,
19 and base the contents of this declaration on my own personal knowledge and/or the
20 litigation files and documents my firm maintains for this litigation.
21 2. Attached hereto as **Exhibit A** is a true and correct copy of the entire set of documents
22 Defendant produced at approximately 9:49 a.m. on Friday, April 4, 2008, in response
23 to Plaintiff's First Set of Requests For Production 2, 4 and 6.
24 3. Attached hereto as **Exhibit B** are true and correct portions of Plaintiff's **First Set** of
25 discovery requests, which include definitions of "Document" and "Electronic Data."
26

1 4. Attached hereto as **Exhibit C** are true and correct portions of the March 7, 2008
2 hearing transcript on Plaintiff's First Motion to Compel.
3

4 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
5 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
6 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR
7 PERJURY.
8

9 Dated this 8th day of April in Vancouver, Washington.
10

11 
12 _____
13 CHEY POWELSON, OSB 03551
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ID	DeptID	Status	Last Date	Off Cycle	Check Dt	Net Pay	Reason
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10182282	2231	T	2007-05-22	N	2007-05-25	288.23	B3
10182282	2231	T	2007-05-22	Y	2007-05-25	35.05	B3
10218579	2213	T	2007-03-30	N	2007-03-30	665.41	B3
10219502	2222	T	2007-09-09	Y	2007-09-19	60.95	A1
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10226974	2228	T	2007-10-06	N	2007-10-12	511.55	A1
10234895	2219	T	2007-06-02	N	2007-06-08	536.58	A1
10242505	2229	T	2007-01-11	Y	2007-01-13	1,041.81	A6
10253199	2216	T	2007-06-26	N	2007-07-06	40.98	B3
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10264284	2236	T	2007-01-21	Y	2007-01-23	421.01	A1
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10267418	2236	T	2007-03-31	N	2007-04-13	198.89	B3
10269361	2236	T	2007-02-15	N	2007-03-02	17.96	B3
10270237	2236	T	2007-02-17	N	2007-03-02	0.39	A1
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10277179	2223	T	2007-04-17	N	2007-04-27	126.22	A5
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10314711	2217	T	2007-10-17	Y	2007-10-22	121.29	A1
10314735	2217	T	2007-06-30	N	2007-07-06	722.63	A5
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10323698	2226	T	2007-09-22	N	2007-09-28	80.75	A1
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10325865	2216	T	2006-12-05	N	2006-12-08	467.47	A6
10325865	2216	T	2006-12-05	Y	2006-12-08	92.31	A6

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10335851	2203	T	2007-04-29	N	2007-06-22	100.00	A1
10337102	2213	T	2007-06-10	N	2007-06-22	211.57	A4
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EXHIBIT

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10358010	2227	T	2007-05-18	N	2007-05-25	478.64	A4
10358231	2232	T	2007-04-24	N	2007-05-11	78.96	A2
10358394	2216	T	2007-04-20	N	2007-04-27	83.11	A6
10359141	2213	T	2007-10-05	N	2007-10-12	326.22	A2
10360475	2219	T	2007-09-07	N	2007-09-14	452.35	B4
10363097	2216	T	2007-08-15	N	2007-08-31	240.91	A4
10363500	2216	T	2007-09-08	N	2007-09-28	234.13	A1
10365554	2235	T	2007-08-01	N	2007-08-17	143.83	TER
10365654	2219	T	2007-08-10	N	2007-08-17	175.84	A6
10366611	2213	T	2007-09-14	N	2007-09-28	83.11	A3
10367126	2216	T	2007-09-28	N	2007-10-12	88.20	A1
10367188	2231	T	2007-11-15	N	2007-12-21	0.00	A6
10367322	1689	T	2007-11-03	N	2007-11-09	35.21	A5
10368101	2231	T	2007-09-28	N	2007-10-12	45.91	A6
10368621	2238	T	2007-11-02	Y	2007-11-05	580.80	B3
10369127	2235	T	2007-08-11	Y	2007-08-21	1,067.67	A1

EXHIBIT A
Page 3-8

oregon terms 11 16 06 - 11 16 07 2.xls

10370676	2236	T	2007-11-01	N	2007-11-09	324.07	TER
10371196	2222	T	2007-08-20	N	2007-08-31	68.34	A6
10371826	2222	T	2007-08-28	N	2007-09-14	110.99	A6
10371834	2222	T	2007-08-28	N	2007-09-14	113.77	A6
10372634	1689	T	2007-09-14	N	2007-09-28	100.47	A4
10373780	2216	T	2007-10-22	Y	2007-11-01	67.60	A5
10375526	2236	T	2007-10-11	N	2007-10-26	92.62	A6
10376586	2213	T	2007-10-18	N	2007-10-26	132.79	A6

EXHIBIT A
Page 4-8

PeopleSoft Action Codes

Action	Action Descr	Reason	Descr	Vol - Invol
ADL	Additional Job	ADL	Additional Job	
ASC	Assignment Completion	ASC	Assignment Completion	
ASG	Assignment	FEX	Foreign Expatriate Assignment	
ASG	Assignment	FIN	Foreign Inpatriate Assignment	
ASG	Assignment	FLA	Foreign Loan Assignment	
ASG	Assignment	NAT	Third Country National	
DEM	Demotion	USP	Unsatisfactory Performance	
DEM	Demotion	VOL	Demotion - Voluntary	
DTA	Data Change	APP	APPRAISAL UPDATE	
DTA	Data Change	CDP	Correction-Department	
DTA	Data Change	CJC	Correction-Job Code	
DTA	Data Change	CPR	Correction-Pay Rate	
DTA	Data Change	FT	Part Time to Full Time	
DTA	Data Change	INV	Invol	
DTA	Data Change	OTH	Other	
DTA	Data Change	PIN	Personal Change	
DTA	Data Change	PT	Full Time to Part Time	
DTA	Data Change	RED	Redesignation	
DTA	Data Change	STC	Status Change	
DTA	Data Change	TPI	TPI DE NEW COM EFF 12/16/01	
DTA	Data Change	VOL	vol	
FSC	Family Status Change	01	Family Status Change-Marriage	
FSC	Family Status Change	02	Family Status Change - Birth	
FSC	Family Status Change	03	Family Status Change-Adoption	
FSC	Family Status Change	04	Family Status Change - Divorce	
FSC	Family Status Change	05	Family Status Change - Spouse	
FSC	Family Status Change	06	Family Status Change - Death	
FSC	Family Status Change	07	Family Status Change-crt order	
FSC	Family Status Change	08	Family Status Change - misc.	
FSC	Family Status Change	DEA	Death	
FSC	Family Status Change	DEP	Married Dependents	
FSC	Family Status Change	DIV	Divorce	
FSC	Family Status Change	MED	Medicare Entitlement	
FTP	Full Time to Part Time	1	Full Time to Part Time	
HIR	Hire	HAF	Hired from Affiliate	
HIR	Hire	LNP	Loan from Parent Company	
HIR	Hire	NHE	New Hire Employee	
HIR	Hire	NPS	New Position	
HIR	Hire	TMP	Temporary Assignment	
HIR	Hire	TRN	Trainee	
JED	Earnings Distribution Change	SSF	Split Shift	
JED	Earnings Distribution Change	TMP	Temporary Assignment	
JRC	Job Reclassification	JRC	Job Reclassification	
JRC	Job Reclassification	REC	JOB RECLASSIFICATION	
LOA	Leave of Absence	00	Pending Leave of Absence	
LOA	Leave of Absence	02	Worker's Compensation	
LOA	Leave of Absence	ADM	Administrative Leave of Abs.	
LOA	Leave of Absence	ADO	UNPAID ADOPTION	
LOA	Leave of Absence	EDU	Education	
LOA	Leave of Absence	FMB	FMLA/BONDING	
LOA	Leave of Absence	FMC	FMLA-CHILD	
LOA	Leave of Absence	FML	Family and Medical Leave Act	
LOA	Leave of Absence	FMM	FMLA/MATERNITY/PATERNITY	
LOA	Leave of Absence	FMP	FMLA/PARENT	

EXHIBIT

A

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Action	Action Descr	Reason	Descr	Vol - Invol
LOA	Leave of Absence	FMS	FMLA-SPOUSE	
LOA	Leave of Absence	HEA	Health Reasons	
LOA	Leave of Absence	HEH	HEALTH-HEART	
LOA	Leave of Absence	HEL	HEALTH/LUNG	
LOA	Leave of Absence	HEM	HEALTH/MUS/SKEL	
LOA	Leave of Absence	HEP	HEALTH/PSYCH	
LOA	Leave of Absence	MAT	Maternity/Paternity	
LOA	Leave of Absence	MIL	Military Leave of Absence	
LOA	Leave of Absence	PEB	PERSONAL/BONDING	
LOA	Leave of Absence	PER	personal leave of absence	
LOA	Leave of Absence	PLO	Personal Leave Of Absence	
LOA	Leave of Absence	PTD	Partial/Total Disability	
LOA	Leave of Absence	USH	Unpaid Statutory Holiday	
LOA	Leave of Absence	WCB	WC BACK	
LOA	Leave of Absence	WCK	WORK COMP KNEE	
LOA	Leave of Absence	WCN	WORK COMP NECK	
LOA	Leave of Absence	WCO	WORK COMP OTHER	
LOA	Leave of Absence	WCS	WORK COMP SHOULDER	
LOA	Leave of Absence	WCT	WORK COMP CARPAL TUNNEL	
LOF	Layoff	RED	Staff Reduction	Involuntary
LOF	Layoff	SEA	Seasonal Closure	Involuntary
LOF	Layoff	SLO	Strike/Lock-out	Involuntary
LOF	Layoff	TMP	Temporary Closure	Involuntary
LTD	Long Term Disability With Pay	LTD	Long Term Disability With Pay	
LTO	Long Term Disability	LTO	Long Term Disability	
PAY	Pay Rate Change	ADJ	Adjustment	
PAY	Pay Rate Change	ATB	Across-The-Board	
PAY	Pay Rate Change	BBC	Bonus to Base Conversion	
PAY	Pay Rate Change	CBC	CAR TO BASE CONVERSION	
PAY	Pay Rate Change	CDR	Common Date Review	
PAY	Pay Rate Change	COL	Cost-of Living Adjustment	
PAY	Pay Rate Change	DMP	Demotion Pay Change	
PAY	Pay Rate Change	EQU	Equity Pay Adjustment	
PAY	Pay Rate Change	EXP	Exception	
PAY	Pay Rate Change	MCO	Matched Counter Offer	
PAY	Pay Rate Change	MER	Merit	
PAY	Pay Rate Change	OTH	Other	
PAY	Pay Rate Change	PRO	Promotion	
PAY	Pay Rate Change	REC	Job Reclassification	
PAY	Pay Rate Change	RME	Range Minimum Exception	
PAY	Pay Rate Change	SPG	Step Progression	
PAY	Pay Rate Change	XFR	Transfer	
PLA	Paid Leave of Absence	FML	PAID LOA/FMLA	
PLA	Paid Leave of Absence	HEA	PAID/HEALTH	
PLA	Paid Leave of Absence	HEH	HEALTH/HEART	
PLA	Paid Leave of Absence	HEL	HEALTH/LUNG	
PLA	Paid Leave of Absence	HEM	HEALTH/MUS/SKEL	
PLA	Paid Leave of Absence	HEP	HEALTH/PSYCH	
PLA	Paid Leave of Absence	LTD	Long-Term Disability	
PLA	Paid Leave of Absence	MAT	Maternity/Paternity	
PLA	Paid Leave of Absence	MIL	Military Service	
PLA	Paid Leave of Absence	STD	Short-Term Disability	
PLA	Paid Leave of Absence	TRW	Transitional Return To Work	
POS	Position Change	INA	Position Inactivated	
POS	Position Change	JRC	Job Re-Classification	
POS	Position Change	NEW	New Position	
POS	Position Change	REO	Re-Organization/Restructure	

EXHIBIT

A

Page

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Action	Action Descr	Reason	Descr	Vol - Invol
POS	Position Change	STA	Position Status Change	
POS	Position Change	TTL	Title Change	
POS	Position Change	UPD	Position Data Update	
POS	Position Change	XFR	Transfer	
PRB	Probation	PRB	On Probation	
PRC	Completion of Probation	PRC	Probation Completed	
PRO	Promotion	NCP	Normal Career Progression	
PRO	Promotion	OPR	Outstanding Performance	
PRO	Promotion	PER	Performance	
PTF	Part Time to Full Time	I	Part Time to Full Time	
REC	Recall from Suspension/Layoff	REC	Recall from Suspension/Layoff	
REH	Rehire	REH	Rehired Employee	
RET	Retirement	ERT	Early Retirement	Voluntary
RET	Retirement	RAT	Retired from Affiliate	Voluntary
RET	Retirement	RMT	Normal Retirement	Voluntary
RFD	Return From Disability	RFD	Return From Disability	
RFL	Return from Leave	CZO	RTW - CHIEF INACTIVES	
RFL	Return from Leave	RFL	Return From Leave	
RWP	Retirement With Pay	RWP	Retirement With Pay	
STD	Short Term Disability With Pay	STD	Short Term Disability With Pay	
STO	Short Term Disability	STO	Short Term Disability	
SUS	Suspension	DAC	Disciplinary Action	
SUS	Suspension	DSB	Disorderly Behavior	
SUS	Suspension	ILA	Illegal Action	
TER	Termination	A1	Quit with Notice	Voluntary
TER	Termination	A2	Moved	Voluntary
TER	Termination	A3	Returned to School	Voluntary
TER	Termination	A4	Abandoned Job	Voluntary
TER	Termination	A5	Found Another Job	Voluntary
TER	Termination	A6	Quit Without Notice	Voluntary
TER	Termination	ATT	Attendance	Involuntary
TER	Termination	B1	Lack of Business	Involuntary
TER	Termination	B2	Job Performance	Involuntary
TER	Termination	B3	Violation of Company Policy	Involuntary
TER	Termination	B4	Absenteeism	Involuntary
TER	Termination	B5	Job Eliminated	Involuntary
TER	Termination	C1	Deceased	Voluntary
TER	Termination	C2	Retired	Voluntary
TER	Termination	C3	Temporary Hire	Voluntary
TER	Termination	C4	Not Eligible LOA/Not Available	Voluntary
TER	Termination	CHI	Child/House Care	Voluntary
TER	Termination	CON	Misconduct	Involuntary
TER	Termination	D1	NO HOUR ACTIVITY	Voluntary
TER	Termination	DEA	Death	Voluntary
TER	Termination	DIS	Dishonesty	Involuntary
TER	Termination	DSC	Discharge	Involuntary
TER	Termination	E1	TZO NV COMPANY SOLD	Voluntary
TER	Termination	EES	Dissatisfied w/Fellow Employee	Voluntary
TER	Termination	ELI	Elimination of Position	Involuntary
TER	Termination	ERT	Early Retirement	Voluntary
TER	Termination	FAM	Family Reasons	Voluntary
TER	Termination	HBA	Health Reasons	Voluntary
TER	Termination	HRS	Dissatisfied with Hours	Voluntary
TER	Termination	ILL	Illness in Family	Voluntary
TER	Termination	INS	Insubordination	INVOLUNTARY
TER	Termination	JOB	Job Abandonment	Voluntary
TER	Termination	LOC	Dissatisfied with Location	Voluntary

INVOIT A
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Action	Action Descr	Reason	Descr	Vol - Invol
TER	Termination	LVE	Failure to Return from Leave	Voluntary
TER	Termination	MAR	Marriage	Voluntary
TER	Termination	MIS	Misstatement on Application	Involuntary
TER	Termination	MUT	Mutual Consent	Voluntary
TER	Termination	OTP	Resignation-Other Position	Voluntary
TER	Termination	PAY	Dissatisfied with Pay	Voluntary
TER	Termination	PER	Personal Reasons	Voluntary
TER	Termination	POL	Dissatisfied w/Comp. Policies	Voluntary
TER	Termination	PRM	Dissatisfied w/Promotion Opps	Voluntary
TER	Termination	PTD	Partial/Total Disability	Voluntary
TER	Termination	RAT	Retired from Affiliate	Voluntary
TER	Termination	RED	Staff Reduction	Involuntary
TER	Termination	REF	Refused Transfer	Voluntary
TER	Termination	REL	Relocation	Voluntary
TER	Termination	RES	Resignation	Voluntary
TER	Termination	RET	Return to School	Voluntary
TER	Termination	RLS	Release	Voluntary
TER	Termination	SUP	Dissatisfied with Supervision	Voluntary
TER	Termination	TAF	Transfer to Affiliate	Voluntary
TER	Termination	TAR	Tardiness	Involuntary
TER	Termination	TMP	End Temporary Employment	Voluntary
TER	Termination	TRA	Transportation Problems	Voluntary
TER	Termination	TYP	Dissatisfied w/Type of Work	Voluntary
TER	Termination	UNS	Unsatisfactory Performance	Involuntary
TER	Termination	VIO	Violation of Rules	Involuntary
TER	Termination	VSP	Voluntary Separation Program	Voluntary
TER	Termination	WOR	Dissatisfied w/Work Conditions	Voluntary
TWB	Terminated With Benefits	TWB	Terminated With Benefits	Voluntary
TWP	Termination With Pay	D1	Lack of Business	Involuntary
TWP	Termination With Pay	TWP	Termination With Pay	Voluntary
XFR	Transfer	EER	Employee Request	
XFR	Transfer	MRR	Manager Request	
XFR	Transfer	PRO	Promotion	
XFR	Transfer	ROR	Reorganization	
XFR	Transfer	TAF	Transfer to Affiliate	
XFR	Transfer	TRN	Employee Transfer	

EXHIBIT A
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1
2
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5
6 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
7 **FOR THE COUNTY OF MULTNOMAH**
8

9 MICHAEL MIGIS,

10 Plaintiff,

No. 0711-13531

11 v.

12 AUTOZONE, INC.,

13 Defendant.
14

**PLAINTIFF'S FIRST SET OF
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

15 **TO: Defendant Autozone, Inc., via his attorney Leigh Ann Tift**

16 Plaintiff hereby requests that Defendant make the following documents, as requested in
17 Exhibit "A", available for inspection and copying at the time, date and place set forth below:
18

19 **TIME, DATE AND PLACE FOR PRODUCTION**

20 **TIME:** 10:00 AM

21 **DATE:** 45 days from service of the Summons and Complaint

22 **PLACE:** Bailey Pinney & Associates LLC
23 1498 SE Tech Center Place, Suite 290
24 Vancouver, WA 98683
25
26

DEFINITIONS

a. "Documents" as used in this request means: (1) all original written, recorded, taped, filmed or graphic matters whatsoever and all annotated or non-identical copies thereof. In all cases where originals are not available, "documents" also means identical copies of original documents and non-identical copies thereof. (2) all writings, contracts, agreements, correspondence, papers, memoranda, diaries, stenographic, handwritten or computer notes, notations, jottings, inter-office or intra-office memoranda and notes of meetings and/or conversations, minutes, (3) all calendars, desk calendars, appointment books, time record books, logs, schedules, (4) all photographs, plans, specifications, tangible things, manuals, promotional material, sound recordings, (5) all communications, telegrams, letters, notes, transcripts, reports and recordings of telephone or other conversations, or of interviews, or of conferences, or of other meetings, affidavits, statements, summaries, (6) all opinions, reports, studies, examinations, analyses, evaluations, agendas, work papers, statistical records, (7) all bulletins, notices, announcements, advertisements, instructions, manuals, brochures, publications, schedules, price lists, client lists, journals, lists, tabulations, publications (8) all computer program data files, all computer printouts, data processing program library, data processing input and output, microfilm, books of account, records, and invoices reflecting business operations, reports, books, records, permits, licenses, bills, canceled checks, charges, financial statements, ledgers, journals, invoices statements, all records kept by electronic, photographic or mechanical means, any notes or drafts relating to the foregoing and all things similar to any of the foregoing however denominated.

b. "Electronic Data" as used in this request includes information from Defendant's computer systems, removable electronic media and other locations. This further includes, but is not limited to, all documents, text files, e-mail and other electronic communication (including logs of e-mail history and usage, header information and "deleted" files), word processing documents, spreadsheets, databases, data dictionaries, calendars, telephone logs, fax logs, alarm or security logs or records, video security or other tapes or recordings, contact manager

1 **REQUEST FOR PRODUCTION NO. 23:** Produce all documents and electronically
 2 stored information reflecting all communications made to any of Defendant's employee's and/or
 3 in response to inquiries pertaining to the Plaintiff's employment relationship, work performance
 4 or other employment-related circumstances.

5 **RESPONSE:**
 6
 7

8 **REQUEST FOR PRODUCTION NO. 24:** Produce all documents and electronically
 9 stored information, which evidence the date on which any employee's employment terminated,
 10 in the year proceeding this lawsuit. This request includes all documents fixed in any tangible
 11 medium of expression, from which they can be perceived, reproduced, or otherwise
 12 communicated, either directly or with the aid of a machine or device.

13 **RESPONSE:**
 14
 15

16 **REQUEST FOR PRODUCTION NO. 25:** Produce the final pay check record,
 17 evidencing the amount and date Defendant made payment of each employee's final wages, for
 18 each employee whose employment has terminated within the year proceeding Plaintiff's
 19 termination. This request includes all documents and electronically stored information.

20 **RESPONSE:**
 21
 22

23 DATED: November 19, 2007.

24
 25 By Susan C. Nelson
 26 SUSAN C. NELSON, WSB 35637
 Attorney for Plaintiff

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH
3
4

5 MICHAEL MIGIS, individually,
6 and on behalf of all other
7 persons similarly situated,
8 Plaintiff,

9 v.

No. 0711-13531

10 AUTOZONE, INC., a Nevada
11 Corporation,
12 Defendant.
13
14
15

16 TRANSCRIPT OF PROCEEDINGS
17

18 BEFORE THE HONORABLE JEROME LABARRE
19 Courtroom 702
20

21 Friday, March 7, 2008
22
23
24
25

1 rule. Time will tell, I guess. That's all I
2 can say.

3 MR. PARKER: Okay. Okay.

4 THE COURT: Is there any reason why you
5 shouldn't be producing those, the documents
6 called for in those requests 2, 4 and 6?

7 MR. PARKER: Your Honor, I just need to
8 find them. And, I'm sorry, that's in the first,
9 that's in the first set?

10 MR. POWELSON: Yes, Your Honor. They would
11 actually be Exhibit C attached to Plaintiff's
12 reply declaration, that sets forth also
13 Defendant's supplemental responses.

14 MR. PARKER: Your Honor, the request, as
15 it's stated, seeks -- I'm looking first at
16 request number two. And what it's seeking is
17 information about all involuntarily terminated
18 employees within the referenced time period.
19 That, Your Honor, is an inappropriate request
20 for production precertification. If the class
21 is certified, that kind of a request becomes
22 appropriate. But we don't have a certified
23 class. If the request is tempered, is tempered
24 to produce information, certainly about the
25 plaintiff himself, and we've actually produced

EXHIBIT C

1 information about the plaintiff himself, and
2 that kind of information that would reasonably
3 be pertinent to a certification question, I
4 think that would be correct and reasonable, Your
5 Honor. But to allow classwide discovery,
6 precertification is improper. And we have cited
7 cases to The Court in our pleadings to that
8 effect.

9 And the same would be true for a request
10 for production number 4. Same would be true for
11 request for production number 6. It's
12 requiring, it's requiring the defendant to
13 engage in a considerable search for that kind of
14 information. You know, it's seeking information
15 about how much time was given before, before the
16 employee terminated and so on, which requires
17 considerable digging.

18 If, if the request is, again, somehow
19 tempered so that the employer isn't required to
20 make an extensive search -- And, by the way, and
21 I'm looking at this assuming that the request is
22 limited to, number one, Oregon employees,
23 because it's, right now it's not even so limited
24 unless it's so limited by their general
25 instruction. And also those who would be within

1 to consolidate the stay is respectfully denied.

2 Mr. Bailey, please prepare an order.

3 And that segues us to the motion on
4 discovery. And let me tell you how I'm looking
5 at the motion on discovery. I really want to
6 get to the heart of this matter. I realize why
7 Defendant has done what Defendant's done and why
8 Plaintiff is making the arguments Plaintiff has
9 made. And, you know, there are some important
10 procedural issues such as Plaintiff's claim that
11 proper objections were not made at the right
12 time and there was waiver and that certain
13 matters should be deemed admitted and certain
14 prohibitions about advancing objections to
15 discovery, Defendants, my colleague, who I have
16 the greatest respect for, Judge Kantor did issue
17 the stay, has created, I understand the question
18 marks that it created. Hopefully those question
19 marks are gone now for purposes of the Migis
20 case and these litigants.

21 But where I come down on this is these
22 kinds of cases move forward with knowledge of
23 the facts on both sides. And I've looked
24 carefully at request for production of documents
25 2, 4 and 6. And as set out in Plaintiff's reply

EXHIBIT

C

1 on page 4, lines 15 through 18, you know, I will
2 just tell you and then I'll, I don't think we
3 certainly have time for the lengthy argument
4 that took place on the motion to stay. But the
5 plaintiff says this, even if this court declines
6 to deem Plaintiff's request for admissions as
7 admitted -- And that's how I am pretty strongly
8 leaning. I'm not ruling this moment, but I'm
9 not leaning toward declaring that these are
10 admissions. Phrased differently, I'm leaning
11 toward Defendant's argument. I'm not leaning
12 toward Plaintiff's argument on that. But then
13 Plaintiff goes on to say, basically Defendants
14 should produce the documents in request for
15 production 2, 4 and 6. And looking at those
16 requests for production, they, in view of the
17 fact that I've now denied the motion for stay
18 and consolidation, they seem like they should be
19 discovered posthaste, produced posthaste. So
20 that's how I'm looking at it.

21 So, Mr. Parker, if you want to try to talk
22 me out of it.

23 MR. PARKER: Well, Your Honor, I guess what
24 I'd like to do is ask for some dialogue with The
25 Court in terms of the case going forward. The

EXHIBIT C

C E R T I F I C A T E

I, Aleshia K. Macon, CSR No. 94-0296, do hereby certify that said proceedings were taken down by me in stenotype and thereafter reduced to typewriting; and that the foregoing transcript, Pages 1 to 66, both inclusive, constitutes a full, true and accurate record of said proceedings to the best of my ability.

Witness my hand at Portland, Oregon, this 19th day of March, 2008.



Aleshia K. Macon
CSR No. 94-0296

EXHIBIT CPage 66-66

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Reply Declaration of Chey K. Powelson Supporting Plaintiff's Motion to Enforce Court Order** upon:

Messrs. Doug Parker and Neil Olsen
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be **hand-delivered** to the person listed above on the date set forth below.

☐ by **faxing** a full, true, and correct copy thereof to the person at facsimile number 503-961-7854, which is the last-known fax number for the person, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed. Attached herewith is the confirmation of receipt which was generated by the transmitting machine.

DATED: April 8, 2008



CHEY POWELSON, OSB 03551
Of Attorneys for Plaintiff

***** -COMM. JOURNAL- ***** DATE APR-08-2008 ***** TIME 10:53 *****

MODE = MEMORY TRANSMISSION

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END=APR-08 10:53

FILE NO.=939

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	A	15039617854	030/030	00:10:00

-BAILEY PINNEY -

***** UF-8000 v2 ***** -3605673331 - ***** - *****

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

Tele: 1-800-882-8351
Fax: 360-567-3331

MT

April 8, 2008

PERSONAL AND CONFIDENTIAL

TO: Doug Parker & Neil Olsen

FAX NO. 503-961-7854

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Migis v. AutoZone

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, *et al.*,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

REPLY DECLARATION OF
CHEY K. POWELSON
SUPPORTING PLAINTIFF'S
MOTION TO ENFORCE COURT
ORDER ON FIRST MOTION FOR
AN ORDER COMPELLING
DISCOVERY

I, Chey K. Powelson, hereby declare as follows:

1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter, and base the contents of this declaration on my own personal knowledge and/or the litigation files and documents my firm maintains for this litigation.
2. Attached hereto as **Exhibit A** is a true and correct copy of the entire set of documents Defendant produced at approximately 9:49 a.m. on Friday, April 4, 2008, in response to Plaintiff's First Set of Requests For Production 2, 4 and 6.
3. Attached hereto as **Exhibit B** are true and correct portions of Plaintiff's First Set of discovery requests, which include definitions of "Document" and "Electronic Data."

Page 1 -

REPLY DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S MOTION TO
ENFORCE COURT ORDER ON FIRST MOTION FOR AN ORDER COMPELLING DISCOVERY

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

1 4. Attached hereto as **Exhibit C** are true and correct portions of the March 7, 2008.
2 hearing transcript on Plaintiff's First Motion to Compel.
3

4 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
5 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
6 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR
7 PERJURY.
8

9 Dated this 8th day of April in Vancouver, Washington.

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12 CHEY POWELSON, OSB 03551
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ID	DeptID	Status	Last Date	Off Cycle	Check Dt	Net Pay	Reason
10004509	2235	T	2007-08-27	N	2007-09-14	219.37	B3
10165628	2217	T	2007-05-12	Y	2007-05-16	121.88	A1
10181520	1689	T	2007-02-16	N	2007-02-16	1,171.27	B3
10182282	2231	T	2007-05-22	N	2007-05-25	288.23	B3
10182282	2231	T	2007-05-22	Y	2007-05-25	35.05	B3
10218579	2213	T	2007-03-30	N	2007-03-30	665.41	B3
10219502	2222	T	2007-09-09	Y	2007-09-19	60.95	A1
10222778	2229	T	2007-03-15	Y	2007-03-23	37.48	A5
10226974	2228	T	2007-10-06	N	2007-10-12	511.55	A1
10234895	2219	T	2007-06-02	N	2007-06-08	536.58	A1
10242505	2229	T	2007-01-11	Y	2007-01-13	1,041.81	A6
10253199	2216	T	2007-06-26	N	2007-07-06	40.98	B3
10258667	1689	T	2007-05-11	Y	2007-05-16	318.74	A1
10264284	2236	T	2007-01-21	Y	2007-01-23	421.01	A1
10265476	2227	T	2007-03-23	N	2007-03-30	579.41	A1
10267418	2236	T	2007-03-31	N	2007-04-13	198.89	B3
10269361	2236	T	2007-02-15	N	2007-03-02	17.96	B3
10270237	2236	T	2007-02-17	N	2007-03-02	0.39	A1
10270237	2236	T	2007-02-17	N	2007-03-02	46.49	A1
10271245	2216	T	2007-01-12	N	2007-01-19	199.86	A1
10274411	2203	T	2007-09-25	N	2007-10-12	45.53	A3
10277179	2223	T	2007-04-17	N	2007-04-27	126.22	A5
10285446	2222	T	2007-03-14	N	2007-03-30	268.24	A1
10286631	2217	T	2007-05-05	N	2007-05-11	584.42	A1
10287139	2217	T	2007-08-06	Y	2007-08-08	378.79	A5
10287783	2228	T	2007-05-22	N	2007-05-25	286.93	A6
10293280	2231	T	2007-05-03	Y	2007-05-07	516.52	A1
10295533	3751	T	2007-08-04	N	2007-09-14	213.70	A6
10295566	2225	T	2007-09-06	N	2007-09-28	69.26	B3
10305167	2228	T	2007-01-09	N	2007-01-19	405.47	OTH
10305420	2203	T	2006-11-25	Y	2006-11-29	276.79	A5
10308163	2219	T	2007-07-16	N	2007-05-25	0.36	A1
10310068	2227	T	2007-09-01	Y	2007-09-13	391.96	TER
10310478	2227	T	2007-02-09	N	2007-02-16	249.88	A1
10311813	2225	T	2006-12-06	N	2006-12-22	198.55	A1
10313503	2217	T	2007-05-02	N	2007-05-11	391.20	A6
10314711	2217	T	2007-10-17	Y	2007-10-22	121.29	A1
10314735	2217	T	2007-06-30	N	2007-07-06	722.63	A5
10317043	2219	T	2007-09-01	Y	2007-09-10	320.66	TER
10318613	2236	T	2007-09-15	N	2007-09-14	464.48	B3
10319724	1689	T	2006-11-19	N	2006-12-08	45.69	A4
10320280	2203	T	2007-11-10	N	2007-11-09	261.21	A1
10320280	2203	T	2007-11-10	Y	2007-11-09	117.83	A1
10322674	2229	T	2007-09-07	N	2007-09-14	536.55	A4
10323694	2229	T	2007-03-22	Y	2007-03-23	289.89	A3
10323698	2226	T	2007-09-22	N	2007-09-28	80.75	A1
10324192	2227	T	2006-12-15	N	2006-12-22	546.07	B4
10324857	2233	T	2006-12-23	N	2007-01-05	455.20	A6
10325865	2216	T	2006-12-05	N	2006-12-08	467.47	A6
10325865	2216	T	2006-12-05	Y	2006-12-08	92.31	A6

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10326113	2238	T	2007-01-10	N	2007-01-19	635.34	OTH
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10331250	2225	T	2007-10-06	Y	2007-10-17	457.95	A6
10331602	3751	T	2007-01-03	N	2007-01-19	0.00	B3
10332271	2227	T	2006-11-29	N	2006-12-08	228.55	A1
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10334456	2229	T	2007-03-30	N	2007-03-30	848.00	A6
10334495	1689	T	2006-12-09	N	2006-12-22	91.96	A1
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10334642	2222	T	2007-02-09	Y	2007-02-16	240.65	OTH
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10334876	1689	T	2007-07-06	N	2007-07-20	275.15	A4
10335318	2217	T	2007-03-29	N	2007-04-13	150.70	A2
10335851	2203	T	2007-04-29	N	2007-06-22	0.00	A1
10335851	2203	T	2007-04-29	N	2007-06-22	100.00	A1
10337102	2213	T	2007-06-10	N	2007-06-22	211.57	A4
10337228	2228	T	2007-01-05	N	2007-01-05	292.47	B3
10337244	2236	T	2007-05-19	N	2007-06-08	0.21	A4
10337265	2236	T	2007-02-14	Y	2007-03-07	113.04	A6
10337274	2236	T	2007-08-28	N	2007-06-08	0.36	A1
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10339120	2216	T	2007-02-17	Y	2007-02-21	587.86	A6
10339672	2226	T	2007-02-24	N	2007-03-02	290.54	A1
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10339724	1689	T	2007-05-21	N	2007-06-08	42.89	A4
10339743	2226	T	2007-01-14	N	2007-02-02	55.87	A6
10340307	2214	T	2007-05-14	N	2007-05-25	76.46	A4
10340861	2223	T	2006-11-21	N	2006-12-08	121.67	A6
10340888	2223	T	2007-01-01	N	2007-01-05	167.83	A1
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10342024	2231	T	2007-07-23	N	2007-07-20	101.15	A1
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10342570	2227	T	2007-01-14	N	2007-02-16	51.35	A4
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10343777	2225	T	2007-01-03	N	2007-01-19	41.18	A6
10343801	2203	T	2007-02-28	N	2007-03-02	425.04	A5
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10345519	2216	T	2007-06-29	N	2007-06-22	52.49	A1
10345528	2227	T	2007-02-07	N	2007-02-16	470.62	A2
10346149	1689	T	2007-05-18	N	2007-05-25	303.78	A1
10346150	1689	T	2007-02-14	N	2007-02-16	458.60	B3
10346217	2216	T	2007-03-20	Y	2007-03-23	464.76	A1
10346221	2216	T	2007-05-04	N	2007-05-11	322.83	A6
10346643	3751	T	2006-12-26	N	2007-01-05	30.97	A6

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10346806	2203	T	2006-12-23	N	2007-01-05	73.88	A1
10346896	2203	T	2007-01-03	N	2007-01-19	130.73	A4
10347087	1689	T	2007-01-22	N	2007-03-30	25.85	A2
10347154	2219	T	2007-02-05	N	2007-02-16	550.76	OTH
10347204	2219	T	2007-06-30	N	2007-08-17	0.39	A1
10347495	2229	T	2007-05-23	Y	2007-05-23	161.65	A1
10348578	2228	T	2007-02-04	N	2007-02-16	126.44	A6
10348673	2238	T	2007-07-20	N	2007-08-03	182.85	A4
10349310	2227	T	2007-08-24	N	2007-08-31	712.95	A1
10349327	2227	T	2007-08-03	N	2007-08-03	485.87	B3
10349331	1689	T	2007-05-08	N	2007-07-06	204.10	A4
10349662	1689	T	2007-04-01	N	2007-04-13	233.04	A6
10349895	2228	T	2007-02-16	Y	2007-02-24	297.27	A4
10349904	2225	T	2007-03-22	N	2007-03-30	155.16	A5
10350500	2236	T	2007-04-13	N	2007-04-27	88.69	A1
10350706	3751	T	2007-03-17	N	2007-03-30	127.24	A6
10351174	2226	T	2007-03-23	N	2007-03-30	456.77	A4
10351213	2246	T	2007-07-22	N	2007-08-03	178.59	A1
10351631	2232	T	2007-08-30	N	2007-08-31	200.99	A1
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10352728	2219	T	2007-04-27	N	2007-05-11	172.85	A6
10352745	2233	T	2007-03-16	N	2007-12-07	0.00	A1
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10354066	2227	T	2007-04-02	N	2007-04-13	338.07	A4
10354912	2237	T	2007-05-19	N	2007-05-25	269.12	A6
10355537	2216	T	2007-04-07	N	2007-04-13	729.67	A5
10355839	2214	T	2007-05-01	N	2007-04-27	141.10	TER
10357055	2217	T	2007-09-10	Y	2007-09-18	67.97	A5
10357108	2228	T	2007-07-29	N	2007-08-17	37.56	A6
10357117	2228	T	2007-07-08	N	2007-07-20	32.58	A6
10357146	3751	T	2007-08-27	N	2007-09-14	0.00	A6
10357340	2227	T	2007-11-13	N	2007-11-23	373.60	A1
10357407	3751	T	2007-06-02	N	2007-06-08	288.94	A6
10357490	2226	T	2007-06-15	N	2007-06-22	533.27	A4
10357724	1689	T	2007-06-15	N	2007-07-06	230.71	A1
10358010	2227	T	2007-05-18	N	2007-05-25	478.64	A4
10358231	2232	T	2007-04-24	N	2007-05-11	78.96	A2
10358394	2216	T	2007-04-20	N	2007-04-27	83.11	A6
10359141	2213	T	2007-10-05	N	2007-10-12	326.22	A2
10360475	2219	T	2007-09-07	N	2007-09-14	452.35	B4
10363097	2216	T	2007-08-15	N	2007-08-31	240.91	A4
10363500	2216	T	2007-09-08	N	2007-09-28	234.13	A1
10365554	2235	T	2007-08-01	N	2007-08-17	143.83	TER
10365654	2219	T	2007-08-10	N	2007-08-17	175.84	A6
10366611	2213	T	2007-09-14	N	2007-09-28	83.11	A3
10367126	2216	T	2007-09-28	N	2007-10-12	88.20	A1
10367188	2231	T	2007-11-15	N	2007-12-21	0.00	A6
10367322	1689	T	2007-11-03	N	2007-11-09	35.21	A5
10368101	2231	T	2007-09-28	N	2007-10-12	45.91	A6
10368621	2238	T	2007-11-02	Y	2007-11-05	580.80	B3
10369127	2235	T	2007-08-11	Y	2007-08-21	1,067.67	A1

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10370676	2236	T	2007-11-01	N	2007-11-09	324.07	TER
10371196	2222	T	2007-08-20	N	2007-08-31	68.34	A6
10371826	2222	T	2007-08-28	N	2007-09-14	110.99	A6
10371834	2222	T	2007-08-28	N	2007-09-14	113.77	A6
10372634	1689	T	2007-09-14	N	2007-09-28	100.47	A4
10373780	2216	T	2007-10-22	Y	2007-11-01	67.60	A5
10375526	2236	T	2007-10-11	N	2007-10-26	92.62	A6
10376586	2213	T	2007-10-18	N	2007-10-26	132.79	A6

EXHIBIT A
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PeopleSoft Action Codes

Action	Action Descr	Reason	Descr	Vol - Invol
ADL	Additional Job	ADL	Additional Job	
ASC	Assignment Completion	ASC	Assignment Completion	
ASG	Assignment	FEX	Foreign Expatriate Assignment	
ASG	Assignment	FIN	Foreign Inpatriate Assignment	
ASG	Assignment	FLA	Foreign Loan Assignment	
ASG	Assignment	NAT	Third Country National	
DEM	Demotion	USP	Unsatisfactory Performance	
DEM	Demotion	VOL	Demotion - Voluntary	
DTA	Data Change	APP	APPRAISAL UPDATE	
DTA	Data Change	CDP	Correction-Department	
DTA	Data Change	CJC	Correction-Job Code	
DTA	Data Change	CPR	Correction-Pay Rate	
DTA	Data Change	FT	Part Time to Full Time	
DTA	Data Change	INV	Invol	
DTA	Data Change	OTH	Other	
DTA	Data Change	PIN	Personal Change	
DTA	Data Change	PT	Full Time to Part Time	
DTA	Data Change	RED	Redesignation	
DTA	Data Change	STC	Status Change	
DTA	Data Change	TPI	TPI DE NEW COM EFF 12/16/01	
DTA	Data Change	VOL	vol	
FSC	Family Status Change	01	Family Status Change-Marriage	
FSC	Family Status Change	02	Family Status Change - Birth	
FSC	Family Status Change	03	Family Status Change-Adoption	
FSC	Family Status Change	04	Family Status Change - Divorce	
FSC	Family Status Change	05	Family Status Change - Spouse	
FSC	Family Status Change	06	Family Status Change - Death	
FSC	Family Status Change	07	Family Status Change-crt order	
FSC	Family Status Change	08	Family Status Change - misc.	
FSC	Family Status Change	DEA	Death	
FSC	Family Status Change	DEP	Married Dependents	
FSC	Family Status Change	DIV	Divorce	
FSC	Family Status Change	MED	Medicare Entitlement	
FTP	Full Time to Part Time	1	Full Time to Part Time	
HIR	Hire	HAF	Hired from Affiliate	
HIR	Hire	LNP	Loan from Parent Company	
HIR	Hire	NHE	New Hire Employee	
HIR	Hire	NPS	New Position	
HIR	Hire	TMP	Temporary Assignment	
HIR	Hire	TRN	Trainee	
JED	Earnings Distribution Change	SSF	Split Shift	
JED	Earnings Distribution Change	TMP	Temporary Assignment	
JRC	Job Reclassification	JRC	Job Reclassification	
JRC	Job Reclassification	REC	JOB RECLASSIFICATION	
LOA	Leave of Absence	00	Pending Leave of Absence	
LOA	Leave of Absence	02	Worker's Compensation	
LOA	Leave of Absence	ADM	Administrative Leave of Abs.	
LOA	Leave of Absence	ADO	UNPAID ADOPTION	
LOA	Leave of Absence	EDU	Education	
LOA	Leave of Absence	FMB	FMLA/BONDING	
LOA	Leave of Absence	FMC	FMLA-CHILD	
LOA	Leave of Absence	FML	Family and Medical Leave Act	
LOA	Leave of Absence	FMM	FMLA/MATERNITY/PATERNITY	
LOA	Leave of Absence	FMP	FMLA/PARENT	

EXHIBIT A
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Action	Action Descr	Reason	Descr	Vol - Invol
LOA	Leave of Absence	FMS	FMLA-SPOUSE	
LOA	Leave of Absence	HEA	Health Reasons	
LOA	Leave of Absence	HEH	HEALTH-HEART	
LOA	Leave of Absence	HEL	HEALTH/LUNG	
LOA	Leave of Absence	HEM	HEALTH/MUS/SKEL	
LOA	Leave of Absence	HEP	HEALTH/PSYCH	
LOA	Leave of Absence	MAT	Maternity/Paternity	
LOA	Leave of Absence	MIL	Military Leave of Absence	
LOA	Leave of Absence	PEB	PERSONAL/BONDING	
LOA	Leave of Absence	PER	personal leave of absence	
LOA	Leave of Absence	PLO	Personal Leave Of Absence	
LOA	Leave of Absence	PTD	Partial/Total Disability	
LOA	Leave of Absence	USH	Unpaid Statutory Holiday	
LOA	Leave of Absence	WCB	WC BACK	
LOA	Leave of Absence	WCK	WORK COMP KNEE	
LOA	Leave of Absence	WCN	WORK COMP NECK	
LOA	Leave of Absence	WCO	WORK COMP OTHER	
LOA	Leave of Absence	WCS	WORK COMP SHOULDER	
LOA	Leave of Absence	WCT	WORK COMP CARPAL TUNNEL	
LOF	Layoff	RED	Staff Reduction	Involuntary
LOF	Layoff	SEA	Seasonal Closure	Involuntary
LOF	Layoff	SLO	Strike/Lock-out	Involuntary
LOF	Layoff	TMP	Temporary Closure	Involuntary
LTD	Long Term Disability With Pay	LTD	Long Term Disability With Pay	
LTO	Long Term Disability	LTO	Long Term Disability	
PAY	Pay Rate Change	ADJ	Adjustment	
PAY	Pay Rate Change	ATB	Across-The-Board	
PAY	Pay Rate Change	BBC	Bonus to Base Conversion	
PAY	Pay Rate Change	CBC	CAR TO BASE CONVERSION	
PAY	Pay Rate Change	CDR	Common Date Review	
PAY	Pay Rate Change	COL	Cost-of Living Adjustment	
PAY	Pay Rate Change	DMP	Demotion Pay Change	
PAY	Pay Rate Change	EQU	Equity Pay Adjustment	
PAY	Pay Rate Change	EXP	Exception	
PAY	Pay Rate Change	MCO	Matched Counter Offer	
PAY	Pay Rate Change	MER	Merit	
PAY	Pay Rate Change	OTH	Other	
PAY	Pay Rate Change	PRO	Promotion	
PAY	Pay Rate Change	REC	Job Reclassification	
PAY	Pay Rate Change	RME	Range Minimum Exception	
PAY	Pay Rate Change	SPG	Step Progression	
PAY	Pay Rate Change	XFR	Transfer	
PLA	Paid Leave of Absence	FML	PAID LOA/FMLA	
PLA	Paid Leave of Absence	HEA	PAID/HEALTH	
PLA	Paid Leave of Absence	HEH	HEALTH/HEART	
PLA	Paid Leave of Absence	HEL	HEALTH/LUNG	
PLA	Paid Leave of Absence	HEM	HEALTH/MUS/SKEL	
PLA	Paid Leave of Absence	HEP	HEALTH/PSYCH	
PLA	Paid Leave of Absence	LTD	Long-Term Disability	
PLA	Paid Leave of Absence	MAT	Maternity/Paternity	
PLA	Paid Leave of Absence	MIL	Military Service	
PLA	Paid Leave of Absence	STD	Short-Term Disability	
PLA	Paid Leave of Absence	TRW	Transitional Return To Work	
POS	Position Change	INA	Position Inactivated	
POS	Position Change	JRC	Job Re-Classification	
POS	Position Change	NEW	New Position	
POS	Position Change	REO	Re-Organization/Restructure	

EXHIBIT

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Action	Action Descr	Reason	Descr	Vol - Invol
POS	Position Change	STA	Position Status Change	
POS	Position Change	TTL	Title Change	
POS	Position Change	UPD	Position Data Update	
POS	Position Change	XFR	Transfer	
PRB	Probation	PRB	On Probation	
PRC	Completion of Probation	PRC	Probation Completed	
PRO	Promotion	NCP	Normal Career Progression	
PRO	Promotion	OPR	Outstanding Performance	
PRO	Promotion	PER	Performance	
PTF	Part Time to Full Time	I	Part Time to Full Time	
REC	Recall from Suspension/Layoff	REC	Recall from Suspension/Layoff	
REH	Rehire	REH	Rehired Employee	
RET	Retirement	ERT	Early Retirement	Voluntary
RET	Retirement	RAT	Retired from Affiliate	Voluntary
RET	Retirement	RMT	Normal Retirement	Voluntary
RFD	Return From Disability	RFD	Return From Disability	
RFL	Return from Leave	CZO	RTW - CHIEF INACTIVES	
RFL	Return from Leave	RFL	Return From Leave	
RWP	Retirement With Pay	RWP	Retirement With Pay	
STD	Short Term Disability With Pay	STD	Short Term Disability With Pay	
STO	Short Term Disability	STO	Short Term Disability	
SUS	Suspension	DAC	Disciplinary Action	
SUS	Suspension	DSB	Disorderly Behavior	
SUS	Suspension	ILA	Illegal Action	
TER	Termination	A1	Quit with Notice	Voluntary
TER	Termination	A2	Moved	Voluntary
TER	Termination	A3	Returned to School	Voluntary
TER	Termination	A4	Abandoned Job	Voluntary
TER	Termination	A5	Found Another Job	Voluntary
TER	Termination	A6	Quit Without Notice	Voluntary
TER	Termination	ATT	Attendance	Involuntary
TER	Termination	B1	Lack of Business	Involuntary
TER	Termination	B2	Job Performance	Involuntary
TER	Termination	B3	Violation of Company Policy	Involuntary
TER	Termination	B4	Absenteeism	Involuntary
TER	Termination	B5	Job Eliminated	Involuntary
TER	Termination	C1	Deceased	Voluntary
TER	Termination	C2	Retired	Voluntary
TER	Termination	C3	Temporary Hire	Voluntary
TER	Termination	C4	Not Eligible LOA/Not Available	Voluntary
TER	Termination	CHI	Child/House Care	Voluntary
TER	Termination	CON	Misconduct	Involuntary
TER	Termination	D1	NO HOUR ACTIVITY	Voluntary
TER	Termination	DEA	Death	Voluntary
TER	Termination	DIS	Dishonesty	Involuntary
TER	Termination	DSC	Discharge	Involuntary
TER	Termination	E1	TZO NV COMPANY SOLD	Voluntary
TER	Termination	EES	Dissatisfied w/Fellow Employee	Voluntary
TER	Termination	ELI	Elimination of Position	Involuntary
TER	Termination	ERT	Early Retirement	Voluntary
TER	Termination	FAM	Family Reasons	Voluntary
TER	Termination	HEA	Health Reasons	Voluntary
TER	Termination	HRS	Dissatisfied with Hours	Voluntary
TER	Termination	ILL	Illness in Family	Voluntary
TER	Termination	INS	Insubordination	INVOLUNTARY
TER	Termination	JOB	Job Abandonment	Voluntary
TER	Termination	LOC	Dissatisfied with Location	Voluntary

EXHIBIT A
Page 7-8

Action	Action Descr	Reason	Descr	Vol - Invol
TER	Termination	LVE	Failure to Return from Leave	Voluntary
TER	Termination	MAR	Marriage	Voluntary
TER	Termination	MIS	Misstatement on Application	Involuntary
TER	Termination	MUT	Mutual Consent	Voluntary
TER	Termination	OTP	Resignation-Other Position	Voluntary
TER	Termination	PAY	Dissatisfied with Pay	Voluntary
TER	Termination	PER	Personal Reasons	Voluntary
TER	Termination	POL	Dissatisfied w/Comp. Policies	Voluntary
TER	Termination	PRM	Dissatisfied w/Promotion Opps	Voluntary
TER	Termination	PTD	Partial/Total Disability	Voluntary
TER	Termination	RAT	Retired from Affiliate	Voluntary
TER	Termination	RED	Staff Reduction	Involuntary
TER	Termination	REF	Refused Transfer	Voluntary
TER	Termination	REL	Relocation	Voluntary
TER	Termination	RES	Resignation	Voluntary
TER	Termination	RET	Return to School	Voluntary
TER	Termination	RLS	Release	Voluntary
TER	Termination	SUP	Dissatisfied with Supervision	Voluntary
TER	Termination	TAF	Transfer to Affiliate	Voluntary
TER	Termination	TAR	Tardiness	Involuntary
TER	Termination	TMP	End Temporary Employment	Voluntary
TER	Termination	TRA	Transportation Problems	Voluntary
TER	Termination	TYP	Dissatisfied w/Type of Work	Voluntary
TER	Termination	UNS	Unsatisfactory Performance	Involuntary
TER	Termination	VIO	Violation of Rules	Involuntary
TER	Termination	VSP	Voluntary Separation Program	Voluntary
TER	Termination	WOR	Dissatisfied w/Work Conditions	Voluntary
TWB	Terminated With Benefits	TWB	Terminated With Benefits	Voluntary
TWP	Termination With Pay	D1	Lack of Business	Involuntary
TWP	Termination With Pay	TWP	Termination With Pay	Voluntary
XFR	Transfer	EER	Employee Request	
XFR	Transfer	MRR	Manager Request	
XFR	Transfer	PRO	Promotion	
XFR	Transfer	ROR	Reorganization	
XFR	Transfer	TAF	Transfer to Affiliate	
XFR	Transfer	TRN	Employee Transfer	

EXHIBIT A
Page 8-8

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5
6
7 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
8 **FOR THE COUNTY OF MULTNOMAH**

9 MICHAEL MIGIS,

10 Plaintiff,

No. 0711-13531

11 v.

12 AUTOZONE, INC.,

13 Defendant.

**PLAINTIFF'S FIRST SET OF
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

14
15 **TO: Defendant Autozone, Inc., via his attorney Leigh Ann Tift**

16 Plaintiff hereby requests that Defendant make the following documents, as requested in
17 Exhibit "A", available for inspection and copying at the time, date and place set forth below:

18
19 **TIME, DATE AND PLACE FOR PRODUCTION**

20 **TIME:** 10:00 AM

21 **DATE:** 45 days from service of the Summons and Complaint

22 **PLACE:** Bailey Pinney & Associates LLC
23 1498 SE Tech Center Place, Suite 290
24 Vancouver, WA 98683
25
26

Page - 1 Plaintiff's First Set of Requests For Production of Documents

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law
1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

EXHIBIT B

Page 1-3

DEFINITIONS

a. "Documents" as used in this request means: (1) all original written, recorded, taped, filmed or graphic matters whatsoever and all annotated or non-identical copies thereof. In all cases where originals are not available, "documents" also means identical copies of original documents and non-identical copies thereof. (2) all writings, contracts, agreements, correspondence, papers, memoranda, diaries, stenographic, handwritten or computer notes, notations, jottings, inter-office or intra-office memoranda and notes of meetings and/or conversations, minutes, (3) all calendars, desk calendars, appointment books, time record books, logs, schedules, (4) all photographs, plans, specifications, tangible things, manuals, promotional material, sound recordings, (5) all communications, telegrams, letters, notes, transcripts, reports and recordings of telephone or other conversations, or of interviews, or of conferences, or of other meetings, affidavits, statements, summaries, (6) all opinions, reports, studies, examinations, analyses, evaluations, agendas, work papers, statistical records, (7) all bulletins, notices, announcements, advertisements, instructions, manuals, brochures, publications, schedules, price lists, client lists, journals, lists, tabulations, publications (8) all computer program data files, all computer printouts, data processing program library, data processing input and output, microfilm, books of account, records, and invoices reflecting business operations, reports, books, records, permits, licenses, bills, canceled checks, charges, financial statements, ledgers, journals, invoices statements, all records kept by electronic, photographic or mechanical means, any notes or drafts relating to the foregoing and all things similar to any of the foregoing however denominated.

b. "Electronic Data" as used in this request includes information from Defendant's computer systems, removable electronic media and other locations. This further includes, but is not limited to, all documents, text files, e-mail and other electronic communication (including logs of e-mail history and usage, header information and "deleted" files), word processing documents, spreadsheets, databases, data dictionaries, calendars, telephone logs, fax logs, alarm or security logs or records, video security or other tapes or recordings, contact manager

1 **REQUEST FOR PRODUCTION NO. 23:** Produce all documents and electronically
2 stored information reflecting all communications made to any of Defendant's employee's and/or
3 in response to inquiries pertaining to the Plaintiff's employment relationship, work performance
4 or other employment-related circumstances.

5 **RESPONSE:**
6
7

8 **REQUEST FOR PRODUCTION NO. 24:** Produce all documents and electronically
9 stored information, which evidence the date on which any employee's employment terminated,
10 in the year proceeding this lawsuit. This request includes all documents fixed in any tangible
11 medium of expression, from which they can be perceived, reproduced, or otherwise
12 communicated, either directly or with the aid of a machine or device.

13 **RESPONSE:**
14
15

16 **REQUEST FOR PRODUCTION NO. 25:** Produce the final pay check record,
17 evidencing the amount and date Defendant made payment of each employee's final wages, for
18 each employee whose employment has terminated within the year proceeding Plaintiff's
19 termination. This request includes all documents and electronically stored information.

20 **RESPONSE:**
21
22

23 DATED: November 19, 2007.

24
25 By Susan C. Nelson
26 SUSAN C. NELSON, WSB 35637
 Attorney for Plaintiff

Page - 12 Plaintiff's First Set of Requests For Production of Documents

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law
1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

EXHIBIT B
Page 3-3

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH
3
4

5 MICHAEL MIGIS, individually,
6 and on behalf of all other
7 persons similarly situated,
8 Plaintiff,

9 v.

No. 0711-13531

10 AUTOZONE, INC., a Nevada
11 Corporation,
12 Defendant.
13
14
15

16 TRANSCRIPT OF PROCEEDINGS
17

18 BEFORE THE HONORABLE JEROME LABARRE
19 Courtroom 702
20

21 Friday, March 7, 2008
22
23
24
25

1 rule. Time will tell, I guess. That's all I
2 can say.

3 MR. PARKER: Okay. Okay.

4 THE COURT: Is there any reason why you
5 shouldn't be producing those, the documents
6 called for in those requests 2, 4 and 6?

7 MR. PARKER: Your Honor, I just need to
8 find them. And, I'm sorry, that's in the first,
9 that's in the first set?

10 MR. POWELSON: Yes, Your Honor. They would
11 actually be Exhibit C attached to Plaintiff's
12 reply declaration, that sets forth also
13 Defendant's supplemental responses.

14 MR. PARKER: Your Honor, the request, as
15 it's stated, seeks -- I'm looking first at
16 request number two. And what it's seeking is
17 information about all involuntarily terminated
18 employees within the referenced time period.
19 That, Your Honor, is an inappropriate request
20 for production precertification. If the class
21 is certified, that kind of a request becomes
22 appropriate. But we don't have a certified
23 class. If the request is tempered, is tempered
24 to produce information, certainly about the
25 plaintiff himself, and we've actually produced

EXHIBIT C

1 information about the plaintiff himself, and
2 that kind of information that would reasonably
3 be pertinent to a certification question, I
4 think that would be correct and reasonable, Your
5 Honor. But to allow classwide discovery,
6 precertification is improper. And we have cited
7 cases to The Court in our pleadings to that
8 effect.

9 And the same would be true for a request
10 for production number 4. Same would be true for
11 request for production number 6. It's
12 requiring, it's requiring the defendant to
13 engage in a considerable search for that kind of
14 information. You know, it's seeking information
15 about how much time was given before, before the
16 employee terminated and so on, which requires
17 considerable digging.

18 If, if the request is, again, somehow
19 tempered so that the employer isn't required to
20 make an extensive search -- And, by the way, and
21 I'm looking at this assuming that the request is
22 limited to, number one, Oregon employees,
23 because it's, right now it's not even so limited
24 unless it's so limited by their general
25 instruction. And also those who would be within

1 to consolidate the stay is respectfully denied.

2 Mr. Bailey, please prepare an order.

3 And that segues us to the motion on
4 discovery. And let me tell you how I'm looking
5 at the motion on discovery. I really want to
6 get to the heart of this matter. I realize why
7 Defendant has done what Defendant's done and why
8 Plaintiff is making the arguments Plaintiff has
9 made. And, you know, there are some important
10 procedural issues such as Plaintiff's claim that
11 proper objections were not made at the right
12 time and there was waiver and that certain
13 matters should be deemed admitted and certain
14 prohibitions about advancing objections to
15 discovery, Defendants, my colleague, who I have
16 the greatest respect for, Judge Kantor did issue
17 the stay, has created, I understand the question
18 marks that it created. Hopefully those question
19 marks are gone now for purposes of the Migis
20 case and these litigants.

21 But where I come down on this is these
22 kinds of cases move forward with knowledge of
23 the facts on both sides. And I've looked
24 carefully at request for production of documents
25 2, 4 and 6. And as set out in Plaintiff's reply

EXHIBIT

C

1 on page 4, lines 15 through 18, you know, I will
2 just tell you and then I'll, I don't think we
3 certainly have time for the lengthy argument
4 that took place on the motion to stay. But the
5 plaintiff says this, even if this court declines
6 to deem Plaintiff's request for admissions as
7 admitted -- And that's how I am pretty strongly
8 leaning. I'm not ruling this moment, but I'm
9 not leaning toward declaring that these are
10 admissions. Phrased differently, I'm leaning
11 toward Defendant's argument. I'm not leaning
12 toward Plaintiff's argument on that. But then
13 Plaintiff goes on to say, basically Defendants
14 should produce the documents in request for
15 production 2, 4 and 6. And looking at those
16 requests for production, they, in view of the
17 fact that I've now denied the motion for stay
18 and consolidation, they seem like they should be
19 discovered posthaste, produced posthaste. So
20 that's how I'm looking at it.

21 So, Mr. Parker, if you want to try to talk
22 me out of it.

23 MR. PARKER: Well, Your Honor, I guess what
24 I'd like to do is ask for some dialogue with The
25 Court in terms of the case going forward. The

EXHIBIT

C

Transcript of Proceedings

March 7, 2008

Page 67

C E R T I F I C A T E

I, Aleshia K. Macom, CSR No. 94-0296, do hereby certify that said proceedings were taken down by me in stenotype and thereafter reduced to typewriting; and that the foregoing transcript, pages 1 to 66, both inclusive, constitutes a full, true and accurate record of said proceedings to the best of my ability.

Witness my hand at Portland, Oregon, this 19th day of March, 2008.



Aleshia K. Macom
CSR No. 94-0296

EXHIBIT C

Broovich Walter & Friend

Page 6-6

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Reply Declaration of Chey K. Powelson Supporting Plaintiff's Motion to Enforce Court Order** upon:


Messrs. Doug Parker and Neil Olsen
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be **hand-delivered** to the person listed above on the date set forth below.

☒ by **faxing** a full, true, and correct copy thereof to the person at facsimile number 503-961-7854, which is the last-known fax number for the person, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed. Attached herewith is the confirmation of receipt which was generated by the transmitting machine.

DATED: April 8, 2008



CHEY POWELSON, OSB 03551
Of Attorneys for Plaintiff

***** -COMM. JOURNAL- ***** DATE APR-08-2008 ***** TIME 10:53 *****

MODE = MEMORY TRANSMISSION

START=APR-08 10:43

END=APR-08 10:53

FILE NO.=939

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	A	15039617854	030/030	00:10:00

-BAILEY PINNEY

***** UF-8000 v2 ***** -3605673331

- *****

- *****

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law

1498 SE TECH CENTER PLACE, SUITE 290

VANCOUVER, WA 98683

Tele: 1-800-882-8351

Fax: 360-567-3331

MT

April 8, 2008

PERSONAL AND CONFIDENTIAL

TO: Doug Parker & Neil Olsen

FAX NO. 503-961-7854

Number of Pages (including cover page): 30

REGARDING:

Migis v. AutoZone

IF YOU DID NOT RECEIVE ALL PAGES, CONTACT ME IMMEDIATELY AT (360) 567-2551

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ORIGINAL DOCUMENTS

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BAILEY PINNEY

P.002

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4 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
5 **FOR THE COUNTY OF MULTNOMAH**

6 **MICHAEL MIGIS**, individually, and on
7 behalf of all other persons similarly situated,

8 Plaintiff,

9 v.

10
11 **AUTOZONE, INC.,**

12 Defendant.
13

Case No. 0711-13531

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
EXTENSION OF TIME (RE: COURT
ORDERS)**

14 **PLAINTIFF MIGIS** hereby responds to Defendant AutoZone's Motion for Extension
15 of Time, which relates to this Court's second order that AutoZone produce all documents
16 responsive to Plaintiff's First Set of Requests For Production 2, 4 and 6. These Requests relate
17 to Defendant's "denials" to Plaintiff's Requests For Admission 1 - 3 (relevant to Plaintiff's
18 claims of late payment of final wages).

19 **A. Procedural Background**

20 Pursuant to ORCP 43, production to those document Requests was initially due in January
21 2008. Defendant refused to produce any documents because at the time it had two motions
22 pending. This Court denied those motions on February 7, 2008.¹

23 In mid February, Plaintiff twice conferred with AutoZone counsel and requested
24 Defendant produce responsive documents. Defendant's counsel refused. Therefore, by late
25

26 ¹ By this reference, Plaintiff incorporates: Plaintiff's January 2008 *Response to Defendant's Motion for a Temporary Stay of Discovery*; Plaintiff's February 2008 *Motion for an Order Compelling Discovery* (and Reply); and Plaintiff's April 2008 *Motion to Enforce Court Order* (and Reply).

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BAILEY PINNEY

P.003

1 February Plaintiff filed a motion to compel production. On February 29, 2008, Defendant
2 "denied" Plaintiff's Requests For Admission 1 - 3, but also remained steadfast that it would not
3 produce documents supporting those denials.

4 On March 7, 2008, the Court ordered AutoZone to produce documents responsive to the
5 discovery requests, and imposed a deadline of 15 business days. By that deadline, AutoZone's
6 response was as follows: "With respect to Plaintiff Migis, Defendant maintains that Plaintiff has
7 all relevant documents; to wit, Plaintiff's final paycheck and Plaintiff's personnel file reflecting
8 the date his employment ended with AutoZone."

9 This was a bad faith response because Plaintiff Migis's employment ended outside the
10 time frame set forth in the discovery requests at issue.

11 Upon notifying Defendant that Plaintiff would seek an expedited hearing on a *Motion to*
12 *Enforce Court Order*, Defendant immediately produced a "summary report," upon which
13 Defendant contends it relied to deny Plaintiff's Requests For Admission 1 - 3. AutoZone
14 apparently created the document in MicroSoft Excel, but sent it to Plaintiff in .pdf format. It
15 purportedly reflects the date of terminated employees' last days worked and final paychecks.

16 The report itself was problematic for several reasons, including: (a) Defendant failed to
17 produce it in original electronic format as requested (Excel, not .pdf); and (b) it contained
18 information refuting all three of AutoZone's denials.

19 During an April 8, 2008 hearing on the *Motion to Enforce Court Order*, the Court, based
20 on Plaintiff's definition of "Documents" and "Electronic Data," ordered Defendant to produce
21 additional documents. During the discovery conference immediately after the April 8 hearing,
22 Defendant's counsel refused to produce the "summary report" in electronic (Excel) format, on
23 the grounds that the Court did not order it. *Powelson Decl.*, ¶ 2.²

24 ///

25 _____
26 ² Despite that refusal, as a professional courtesy and pursuant to ORCP 39C(5), Plaintiff
subsequently "re-requested" only that specific electronic spreadsheet, to be produced at a May 15 ORCP
39C(6) deposition.

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BAILEY PINNEY

P.004

1 During the April 17, 2008 telephonic conference on this matter, Plaintiff's counsel did
2 not refuse to receive documents on an ongoing basis; but agreed that the Court should probably
3 need to address Defendant's ongoing problems with document production. *Powelson Decl.*, ¶ 3.

4 **B. AutoZone's Newest Proposed Time-line for Production**

5 AutoZone's current request for additional time is problematic because:

- 6 1. Apparently at no time before April 16, 2008 did AutoZone counsel check with their
7 client to ascertain the "burden" it now claims six (6) weeks after the hearing on
8 Plaintiff's *Motion* to compel. See Defendant counsel *Tift Decl.*, Ex. 3 (April 16 Tift
9 letter, stating, "I've just concluded a conference with the representatives of AutoZone
10 and write to request that you agree to an extension of time * * *").
- 11 2. At no time before Defendant's present *Motion for Extension of Time* did Defendant
12 present to the Court the type or scope of "burden" of which AutoZone now
13 complains. See ORCP 36C.
- 14 3. Defendant's delay in producing documents is materially affecting Plaintiff's ability
15 to prosecute this case.

16 **C. Defendant's Ability to Produce Documents**

17 AutoZone is now taking "the long way around the barn" by asserting the only way to
18 produce all responsive documents, including "termination reports," is to "print each employee's
19 personnel file and hand search for the form."

20 However, that position appears to undermine AutoZone's representations in *Journt v.*
21 *AutoZone*. During a November 2005 hearing in that case, Defendant's counsel informed Judge
22 Kantor:

23 These guys [AutoZone] come as close to being a truly paperless company as
24 anyplace I have ever seen. They don't have paper. * * * [T]he termination
25 report * * * is clearly a computer-generated document. * * * [T]he payroll
26 records are all electronic.

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BAILEY PINNEY

P.005

1 *Powelson Decl.*, Ex. A (Hearing Transcript, pp. 53:1-6, 53:15-19; 55:5-6 (emphases added)).

2 During that *Joarnt* hearing, Judge Kantor ordered AutoZone to, pursuant to a prior court
3 order, produce "payroll records" and not just a "summary" report. *Powelson Decl.*, Ex. A (p.
4 56:21 - 24).

5 Judge Kantor further stated, "If that requires [AutoZone] to print out a whole bunch of
6 stuff from their computer, so be it. * * * You need to produce the data that supports your
7 summary." *Powelson Decl.*, Ex. A (p. 57:6 - 15).

8 In other words, AutoZone has been in this situation before. Defendant's counsel knows
9 how to produce documents underlying its "summary" reports.

10 Nonetheless, AutoZone now asks this Court for three (3) additional weeks to produce
11 documents it should have produced in January, or should have produced after this Court's March
12 7 ruling.

13 The complete failure to comply with two Court orders constitutes material prejudice to
14 both Plaintiff and the judicial system. See e.g., *Pamplin v. Victoria*, 319 Or 429, 435-36 (1994);
15 and *State v. Kull*, 298 Or 38, 44-45 (1984). Plaintiff requests an award of reasonable expenses
16 for having to respond to Defendant's current *Motion*.³

17
18
19 DATED this 21st day of April 2008. BAILEY, PINNEY & ASSOCIATES, LLC

20
21 
22 A.E. "BUD" BAILEY, OSB 87157
23 CHEY K. POWELSON, OSB 03551
24 Of Attorneys for Plaintiff

25 ³ Plaintiff will also at some later date request an additional award of expenses and non-monetary
26 sanctions relating to the initial *Motion for an Order Compelling Discovery*, as well as expenses relating
to Defendant's bad faith denials of Plaintiff's Requests For Admission 1 - 3. ORCP 46A, ORCP 46B,
ORCP 45, ORCP 46C, and *Smo v. Black*, 95 Or App 588 (1989).

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BAILEY PINNEY

P.006

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, *et al.*,

Case No. 0711-13531

Plaintiff,

v.

**DECLARATION OF CHEY K.
POWELSON SUPPORTING
PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
EXTENSION OF TIME**

AUTOZONE, INC.,

Defendant.

I, Chey K. Powelson, hereby declare as follows:

1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter, and base the contents of this declaration on my own personal knowledge and/or the litigation files and documents my firm maintains for this litigation.
2. After the Court's ruling during the April 8, 2008 hearing on Plaintiff's expedited *Motion to Enforce Court Order*, Plaintiff's counsel (Chey Powelson and Bud Bailey) conferred with AutoZone attorney Neil Olsen in the Court's jury room. During that conference, I asked Mr. Olsen to produce the "summary report" in electronic Excel format. Mr. Olsen refused on the grounds that the Court did not order any such production.

Page 1 -

DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR EXTENSION OF TIME

BAILEY PINNEY & ASSOCIATES, LLC

Attorneys at Law

1498 SE Tech Center Place, Suite 290 - Vancouver, Washington 98683

APR-21-2008 02:10 PM
APR-21-2008 15:117/19
BAILEY PINNEY

P.007

- 1 3. During my April 17, 2008 phone conference with AutoZone counsel Leigh Ann Tift
2 regarding Defendant's request for up to an additional three weeks to produce the
3 documents ordered produced by the Court on April 8, 2008, I did not refuse to
4 receive any responsive documents on an ongoing basis. I did, however, indicate to
5 Ms. Tift that it would be appropriate for Defendant to move the Court for relief.
- 6 4. Attached hereto as Exhibit A is a true and correct copy of excerpts of the transcript
7 from the November 17, 2005 hearing in the *Joarnt v. AutoZone* lawsuit (Multnomah
8 Co. Case No. 0503-02795), relating to a prior *Joarnt* Court order and Defendant's
9 production of documents underlying a "summary" report.

10
11 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
12 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
13 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR
14 PERJURY.

15
16 Dated this 21st day of April in Vancouver, Washington.

17
18 
19 CHEY POWELSON, OSB 03551

APR-21-2008 02:10 PM
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8/19
BAILEY PINNEY

P.008

PLAINTIFF'S EXHIBIT

A

APR-21-2008 02:10 PM
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BAILEY PINNEY

P.009

Page 1

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH
3

4 RICHARD JOARNT and BERT)
YAMAOKA, individually and)
5 on behalf of All Persons)
similarly situated,)
6 Plaintiffs,)
vs.) No. 0503-02795
7)
8 AUTOZONE, INC., a)
Foreign Corporation,)
Defendant.)

9
10 Transcript of Proceedings
11
12

13 BE IT REMEMBERED THAT on the 17th
14 day of November, 2005, the above-entitled matter
15 came on for audio recorded hearing before the
16 HONORABLE HENRY KANTOR, Circuit Court Judge.
17
18
19
20
21

22 DEBORAH L. COOK
COURT REPORTING
1102 N. Springbrook Road
23 Suite 136
Newberg, Oregon 97132
24 (503) 537-0339
deb@cookcourtreporting.com
25

1 APPEARANCES

2
3 For the Plaintiff:

4 MR. A.E. BUD BAILEY

5 MR. DAVID SCHUCK

6 Bailey Pinney & Associates

7 1498 SE Tech Center Place

8 Vancouver, Washington 98683

9
10
11 For the Defendant:

12 MS. LEIGH ANN COLLINGS TIFT

13 Littler Mendelson

14 701 Fifth Avenue, Suite 6500

15 Seattle, Washington 98104

16
17 MS. LAURA LIEBMAN ALPERSON

18 Tonkon Torp

19 888 SW 5th, Suite #1600

20 Portland, Oregon 97204

21
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23
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25
EXHIBIT

A

APR-21-2008 02:10 PM
APR-21-2008 15:1211/19
BAILEY PINNEY

P.011

Page 52

1 MR. BAILEY: But it looks to me like we
2 asked for it, and they should have produced it.

3 THE COURT: I forgot to ask, Ms. Tift, the
4 document you produced in response to order 1-b,
5 what is that? Where did it come from?

6 MS. TIFT: 1-b?

7 THE COURT: Yeah, it's the list that has the
8 names, and check dates, and net pay. Is that
9 something that was created in order to respond to
10 it, as clearly the employees' terminations in
11 Oregon stores was. And that was prepared, in my
12 view, pursuant to the judge's order that a summary
13 should be prepared for that purpose. But what
14 about this other one?

15 MS. TIFT: That's also a payroll summary.
16 One comes from payroll records, and one comes from
17 a People Soft -- People Soft query, and one you
18 make a payroll query. Both reports were generated
19 from Auto Zone corporate headquarters in Memphis.

20 And I am compelled to mention that five
21 copies of a document exist, but I think he's
22 misreading the testimony. These are created on a
23 screen, and they are e-mailed to different places.
24 I don't think they are -- I think he misspoke. I
25 don't think they are e-mailed to Human Resources.

APR-21-2008 02:10 PM
APR-21-2008 15:1212/19
BAILEY PINNEY

P.012

Page 53

1 But they don't print -- they truly -- I have
2 heard people tell me we're a paperless company,
3 which is nonsense, because everybody hangs onto
4 their papers. These guys come as close to being a
5 truly paperless company as anyplace I have ever
6 seen. They don't have paper.

7 THE COURT: But by doing that, don't they
8 open themselves up to basically someone saying, I
9 want to get inside of those computers, because who
10 knows what you have done with those records?
11 That's a very risky thing to do.

12 I appreciate the efficiency and cost
13 savings, but in litigation I would think it would
14 create more problems than it would solve.

15 MS. TIFT: And one last thing, the thing
16 that Mr. Bailey wants so desperately, the
17 termination report -- which, by the way, doesn't
18 have any wage information on it, or any hours
19 worked -- is clearly a computer-generated document.
20 It even has a run date. The information on this
21 isn't any truer or from any source other than the
22 list that was provided.

23 And I don't know how to communicate that
24 it's not any truer on this form than it is on the
25 summary. Thank you, Your Honor.

APR-21-2008 02:10 PM
APR-21-2008 15:12

BAILEY PINNEY

P.013

Page 54

1 THE COURT: Do you have anything more you
2 could print out today that would be responsive to
3 order 1-b? Just, for example, can you, in fact,
4 produce the -- what is it called here -- examples
5 under tab 2 in the notebook. Can you produce
6 those? Or is there some other payroll record that
7 would provide that information? Because 1-b is not
8 a payroll record, as far as I can tell.

9 MS. TIFT: Right. They didn't ask for --
10 this is -- all this is answering is the first
11 request which is, "Produce all documents which
12 evidence the date on which any employee's
13 employment terminated in the year preceding this
14 lawsuit." They don't ask --

15 THE COURT: We're past that. I am looking
16 at the -- I don't care what they asked for. I want
17 to know -- I see what the judge ordered you to
18 produce. So it says, "Defendant is ordered to
19 produce payroll records for all Oregon employees,"
20 et cetera, et cetera, et cetera. So I want to
21 know, do you have payroll records or not to
22 produce?

23 MS. TIFT: Do we have payroll records --

24 THE COURT: Payroll records, what it says.

25 MS. TIFT: But that's what the next one is.

APR-21-2008 02:10 PM
APR-21-2008 15:12

BAILEY PINNEY

P.014

Page 55

1 THE COURT: You are saying the document, tab
2 1-b, which is the summary, is payroll records?
3 Those are payroll records? Or is that a summary
4 that was prepared of payroll records?

5 MS. TIFT: But the payroll records are all
6 electronic.

7 THE COURT: Are you saying you cannot print
8 out the documents, the data from which the summary
9 was made?

10 MS. TIFT: Sure. The paycheck.

11 THE COURT: If those are the best payroll
12 records that you have, then that's what you have to
13 give.

14 MS. TIFT: If a manual paycheck was
15 generated there's a document that looks exactly
16 like their example 2.

17 THE COURT: Right.

18 MS. TIFT: But it's not any truer than this.

19 THE COURT: I don't care. I am sorry. That
20 sounds really crass. Judge Bearden ordered you to
21 produce payroll records. In 1-b he didn't say
22 payroll summary. In 1-a he sure did. No question
23 about that. But 1-b, he didn't.

24 MS. TIFT: But he goes on to say in the next
25 part, the question is -- this whole colloquy -- and

APR-21-2008 02:10 PM
APR-21-2008 15:125/19
BAILEY PINNEY

P.015

Page 56

1 I will draw the Court's attention to -- starting at
2 page -- starting page 13 of the transcript. And
3 this discussion goes on starting about line 19.

4 And we're talking to -- Mr. Schuck is speaking and
5 it says, on precertification, I think it's

6 important to know the difference between those.

7 And he's referring to the date a check was cut, and
8 the date the check was actually given to the
9 employee.

10 If the Court is going to order that, you
11 know, the computer printout is more appropriate for
12 precertification, that's clearly within your
13 discretion. And the Court says, that's what I
14 would do, the payroll summary or printout is a
15 matter of getting started.

16 THE COURT: And if that was what the order
17 said, I would probably go along with it. But it
18 didn't. The other one, it says "documents."
19 That's not very clear. I think it's appropriate to
20 look back and see what he meant by it.

21 But the order says, "payroll records." And
22 so I am going to hold you to the term of the order.
23 Payroll records. And I don't view this document,
24 which is a summary, as the same as payroll records.
25 I do view it as satisfactory for a summary for 1-a.

APR-21-2008 02:10 PM
15:13

BAILEY PINNEY

P.016

Page 57

1 So I appreciate that he talked about it, but
2 that's not what the order says. And since I'm
3 going to require you to comply with the terms of
4 the order, you are going to have to produce payroll
5 records to the extent your organization has them.
6 If that requires them to print out a whole bunch of
7 stuff from their computer, so be it.

8 MS. TIFT: The problem with this -- and I
9 have tried to talk to Ms. Sjostrom, I could print
10 this out in an infinite variety of forms. Do you
11 want the final paycheck?

12 THE COURT: Has to be a record that your
13 company considers a payroll record showing all of
14 these things that is not simply a list. You need
15 to produce the data that supports your summary.
16 There has to be something. Maybe it's this
17 document that is a printout of the paycheck. I
18 don't know. Maybe there's something else. I don't
19 know what your company does in terms of maintaining
20 records, other than if there's something else
21 between the exhibit example 2 and your list, that
22 might be enough. I don't know what it is.

23 MS. TIFT: But the thing is --

24 THE COURT: Clearly, example 2 is sufficient
25 for the plaintiff, and so that's -- why not give

Apr-21-2008 02:10 PM
APR-21-2008 15:1317/19
BAILEY PINNEY

P.017

Page 62

1 STATE OF OREGON)

2) ss.

3 COUNTY OF YAMHILL)
4

5 I, Deborah L. Cook, RPR, Certified Shorthand
6 Reporter in and for the State of Oregon, hereby
7 certify that at said time and place I reported in
8 stenotype all testimony adduced and other oral
9 proceedings had in the foregoing hearing; that
10 thereafter my notes were transcribed by computer-aided
11 transcription by me personally; and that the foregoing
12 transcript contains a full, true and correct record of
13 such testimony adduced and other oral proceedings had,
14 and of the whole thereof.

15 Witness my hand and seal at Dundee, Oregon,
16 this 6th day of December, 2005.



17
18 *Deborah L. Cook*
19 DEBORAH L. COOK, RPR
20

Certified Shorthand Reporter

21 OREGON CSR #04-0389

22 CALIFORNIA CSR #12886

23 WASHINGTON CSR #2992
24
25

EXHIBIT A

APR-21-2008 02:10 PM
APR-21-2008 15:1318/19
BAILEY PINNEY

P.018

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing Plaintiff's Response to Defendant's Motion for Extension of Time (Re: Court Order) upon:

Messrs. Doug Parker and Neil Olsen
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

Leigh Ann Tift (Fax Service Only)
701 5th Avenue
Suite 6500
Seattle WA 98104-7005
(206) 447-6965

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be **hand-delivered** to the person listed above (**Not to include Tift**) on the date set forth below.

☒ by **faxing** a full, true, and correct copy thereof to the person at facsimile number (503)-961-7854 and (206) 447-6965, which is the last-known fax number for the person, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed. Attached herewith is the confirmation of receipt which was generated by the transmitting machine.

DATED: April 21, 2008



CHEY POWELSON, OSB 03551
Attorney for Plaintiff

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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5
6 FOR THE COUNTY OF MULTNOMAH

7 MICHAEL MIGIS, individually, and on
8 behalf of all other persons similarly
situated,

9 Plaintiff,

10 vs.

11 AUTOZONE INC., a Nevada
12 Corporation,

13 Defendant.

No. 0711-13531

NOTICE OF CHANGE OF ADDRESS
(CLERK'S ACTION REQUIRED)

14 TO: CLERK OF THE COURT

15 AND TO: ATTORNEYS OF RECORD

16 Please take notice that effective April 25, 2008, the undersigned attorneys address will
17 change to:

18
19 Leigh Ann Collings Tift
LITTLER MENDELSON, P.C.
20 One Union Square
600 University Street
21 Suite 3200
22 Seattle, WA 98101-3122

23 All other contact information remains the same.
24
25
26

1 Dated: April ____, 2008

2
3 Leigh Ann Collings Tift, OSB # 054732
4 LITTLER MENDELSON, P.C.
5 701 5th Avenue, Suite 6500
6 Seattle, WA 98104
7 Phone: 206.623.3300
8 Fax: 206.447.6965

9 Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on April ____, 2008, I served a full, true, and correct copy of the foregoing **NOTICE OF CHANGE OF ADDRESS**:

- ☐ By delivery via messenger, or otherwise by hand,
- ☐ By facsimile,
- ☐ By e-mail,
- ☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683

Attorneys for Plaintiff

By _____
Savanna L. Stevens

Firmwide:84914699.1 013306.2124

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7 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
8 **FOR THE COUNTY OF MULTNOMAH**
9

10 **MICHAEL MIGIS**, individually and on behalf
11 of all others similarly situated,

12 Plaintiffs,

13 v.

14 **AUTOZONE, INC.**, a Foreign Corporation,

15 Defendant.
16

Case No. **0711-13531**

**ORDER ON PLAINTIFF'S MOTION
TO ENFORCE COURT ORDER ON
PLAINTIFF'S FIRST MOTION FOR
AN ORDER COMPELLING
DISCOVERY**

17 **THIS MATTER** having come before the Court upon expedited hearing of *Plaintiff's*
18 *Motion to Enforce Court Order* as to document production only, and the Court having reviewed
19 the file, and being fully advised of the premise thereof:

20 **THE COURT HEREBY FINDS** there was a lack of good faith compliance with this
21 Court's prior order resulting from the parties' March 7, 2008 hearing on *Plaintiff's First Motion*
22 *for an Order Compelling Discovery, and Determining the Sufficiency of Defendant's Responses*
23 *to Plaintiff's Requests for Admission.*

24 **THE COURT HEREBY ORDERS** that Plaintiff's *Motion to Enforce Court Order* as
25 to document production is GRANTED. Within 15 calendar days after April 8, 2008, Defendant
26

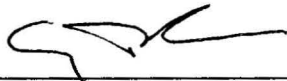
1 must produce all documents required to be produced pursuant to this Court's prior Order, relating
2 to Plaintiff's First Set of Request for Production Nos. 2, 4 and 6.

3
4
5 SIGNED on this _____ day of _____ 2008.

6
7 **THE HON. JEROME LABARRE**
8 **MULTNOMAH CO. CIRCUIT COURT**
9

10 Submitted by:

11 BAILEY, PINNEY & ASSOCIATES, LLC
12

13 

14 A.E. "BUD" BAILEY, OSB NO. 87157
Bbailey@wagelawyer.com
15 CHEY K. POWELSON, OSB NO. 03551
Cpowelson@wagelawyer.com
16 1498 SE Tech Ctr Pl, Ste 290
Phone: 360.567.2551
17 Fax: 360.567.3331
Vancouver, WA 98683
18 Attorneys for Plaintiff
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5 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
6 **FOR THE COUNTY OF MULTNOMAH**

7 **MICHAEL MIGIS**, individually, and on
8 behalf of all others similarly situated,

9 Plaintiff,

10 v.

11 **AUTOZONE, INC.**,

12 Defendant.

Case No. **0711-13531**


**CERTIFICATE OF COMPLIANCE
WITH UTCR 5.100(1)(a)**

13
14 I certify that on April 15, 2008, via regular mail I served upon Defendant's counsel Messrs.
15 Doug Parker and Neil Olsen, and Ms. Leigh Ann Tift Plaintiff's proposed Order on *Plaintiff's*
16 *Motion to Enforce Court Order on Plaintiff's First Motion for an Order Compelling Discovery*. See
17 attached certificate of service.

18 As of the date of this Certificate, Defendant has not notified me with any objections to the
19 form of proposed order.

20
21 SIGNED this 18th day of April 2008.

22 **BAILEY, PINNEY & ASSOCIATES, LLC**

23 
24 A.E. "BUD" BAILEY, OSB 87157
25 CHEY POWELSON, OSB 03551
26 Attorneys for Plaintiff Migis

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Order on Plaintiff's Motion to Enforce Court Order on Plaintiff's First Motion for an Order Compelling Discovery** upon:

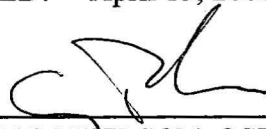
Messrs. Doug Parker and Neil Olsen
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

Leigh Ann Tift
Littler Mendelson
701 5th Avenue
Suite 6500
Seattle WA 98104-7005

by the following indicated method or methods:

[X] by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on the date set-forth below.

DATED: April 15, 2008



CHEY POWELSON, OSB 03551
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S REPLY TO MOTION FOR
IMPOSITION OF MONETARY SANCTION**

I. INTRODUCTION

On April 22, 2008, at a hearing requested by AutoZone, Inc. ("Defendant") for the purpose of seeking an extension of time from the Court for production of discovery materials, Plaintiff made an oral request for daily sanctions against Defendant. This request was not made in any pleading pending before the Court, the amount of the sanctions to be awarded was not addressed, and Plaintiff was directed to make a proposal. Following the hearing, Plaintiff asked that the Court impose sanctions in the amount of \$1,500.00 for every day that AutoZone delayed in producing certain termination reports.

II. RELEVANT FACTS

On November 17, 2008, Defendant filed a Motion for Extension of Time. Plaintiff's Opposition to the Motion contained the following footnote:

Plaintiff will also at some later date request an additional award of expenses and non-monetary sanctions relating to the initial Motion for an *Order Compelling Discovery*, as well as expenses relating to Defendant's bad faith denials of Plaintiff's Requests for Admission 1-3. ORCP 46A, ORCP 46B, ORCP 45, ORCP 46, and *Smo v. Black*, 95 Or. App. 588 (1989).

1 At hearing, Plaintiff's counsel, for the first time, suggested that the Court impose a daily
 2 penalty should Defendant fail to produce documents on the date ordered by the Court (the
 3 documents were due the day after the hearing on the motion for extension of time, April 23). The
 4 Court told Plaintiff's counsel to make a proposal for a specific amount, which the Court would then
 5 impose. Plaintiff did so, in the "Motion for Imposition of Daily Monetary Fine."

6 All termination reports, the subject of the motion for extension of time, were produced to
 7 Plaintiff by April 24, 2008. All pay records, and many termination reports were provided to Plaintiff
 8 on April 23, 2008, the date on which the Court required production.

9 **III. ARGUMENT AND AUTHORITY**

10 At the time of the hearing, Defendant was not in violation of the Court's order to produce
 11 termination and pay reports. Defendant did, however, ask the Court for more time, on an expedited
 12 basis, in order to thoroughly search for termination reports—again, before the due date.

13 ORCP 46 B is the source of a trial court's authority to impose sanctions on a party for
 14 noncompliance with discovery obligations. *Winfrey v. Downtown Delicatessen, Inc.*, 157 Or. App.
 15 668, 675, 971 P.2d 476 (1998). On April 22, 2008, Defendant had not failed to comply with
 16 discovery obligations, and, as was made clear to the Court, fully intended to comply with its
 17 discovery obligations—AutoZone simply needed more time. In any event, Plaintiff did not ask for
 18 discovery sanctions under ORCP 46B—the motion pending before the Court was AutoZone's
 19 motion, not Plaintiff's, and Plaintiffs had not requested any relief from the Court at the time.

20 ORCP 46 is derived from FRCP 37. *See Comment* to ORCP 46. Federal cases construing
 21 FRCP 37 are probative in interpreting ORCP 46. *See, Garrison v. Cook*, 280 Or. 205, 571 P.2d 646,
 22 (1977); *Karsun v. Kelley* 258 Or. 155, 482 P.2d 533 (1971). It is improper to impose sanctions
 23 under the discovery sanction provision (i.e., Rule 37 and/or ORCP 46) where there no order has been
 24 violated. *Israel Aircraft Industries, LTD v. Standard Precision*, 559 F.2d 203, 208 (2nd Cir. 1977).
 25 Moreover, it is error to do so where there is no motion seeking the relief pending. *Id.*

1 Plaintiff now suggests that daily sanctions are warranted as contempt sanctions. However,
2 on April 22, 2008, AutoZone was not in contempt of any court order. AutoZone was asking the
3 Court for relief from a court imposed time frame that had not yet passed. Moreover, as is set out in
4 Plaintiff's opposition to the motion for extension of time, Plaintiff agreed that it was appropriate to
5 ask for an extension of time. *See*, Para. 3, Declaration of Powelson, attached to Decl. of Tift.

6 Consistent with Plaintiff's counsel's encouragement of the motion for extension of time,
7 Plaintiff did not file a motion seeking sanctions as a consequence of the Motion for Extension of
8 Time. Plaintiff's counsel's request for imposition of such sanctions was, seemingly, a spur of the
9 moment impulse. Contempt, unless committed in the presence of the Court, requires motions
10 practice. That is, regardless of whether a sanction is premised on a finding of contempt or deemed
11 justified under FRCP 37 generally, the Constitution requires provision of procedural protections
12 before a noncompensatory, punitive fine can be demanded from a party or attorney. *Satcorp Intern.*
13 *Group v. China Nat. Silk Import & Export Corp.*, 101 F.3d 3 (2nd Cir. 1996).

14 No principle is more fundamental to our system of judicial administration than that a person
15 is entitled to notice before adverse judicial action is taken against him.
16 *Lugo v. Keane*, 15 F.3d 29, 30 (2nd Cir. 1994). Oregon law is in complete accord. *See*, ORS 33.055.
17 Plaintiff's in court demand for the imposition of sanctions was improperly made and cannot be
18 granted.

19 Finally, upon notice that the Court would not consider an extension of time, AutoZone made
20 determined, costly efforts to obtain all relevant documents that could be located that were responsive
21 to Plaintiff's discovery requests and did so within one day of the Court's deadline. AutoZone's
22 efforts do not equate with contemptuous conduct.

1 Dated: May 6, 2008

2
3 
4 Leigh Ann Collings Tift OSB No 05473
5 LITTLER MENDELSON
6 A Professional Corporation

7 Attorneys for Defendant
8 Autozone Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S OPPOSITION TO MOTION FOR IMPOSITION OF DAILY
MONETARY FINE**

- ☐ By delivery via messenger, or otherwise by hand,
☐ By facsimile,
☒ By e-mail,
☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By 
Savanna Stevens

Firmwide:85118536.1 013306.2124

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE, INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DECLARATION OF LEIGH ANN
COLLINGS TIFT IN SUPPORT OF
DEFENDANT'S OPPOSITION TO MOTION
FOR IMPOSITION OF DAILY MONETARY
FINE**

I, Leigh Ann Collings Tift, hereby declare as follows:

1. I am one of the attorneys representing Defendant AutoZone, Inc. in the above-captioned matter, and I make this declaration in support of Defendant, AutoZone's, Objections to Attorney Fee Request and Memorandum in Support Thereof. I have personal knowledge of the matters related herein.

2. On or about April 17, 2008, I had a conversation with Mr. Powelson preparatory to filing a motion for an extension of time for responding to Plaintiff's First Requests for Production. Mr. Powelson told me that Plaintiff would not agree to the request for an extension, and that it would be "appropriate" to seek that relief from the Court. Mr. Powelson's declaration, filed in support of the motion for extension of time, is consistent with my recollection. A copy of Mr. Powelson's Declaration is attached to the Declaration as Exhibit 1. On the basis of that conversation, I did file a motion for extension of time.

1 3. Prior to the date of the hearing, April 22, 2003, Plaintiff had not filed a motion
2 seeking a "monetary fine" and I had no notice that Plaintiff intended to request that relief. Mr.
3 Bailey's request was a complete surprise to me.

4 4. When I informed my client that the motion for extension of time had been denied,
5 they made extraordinary efforts to retrieve all relevant documents responsive to the subject requests.
6 Most of the documents, specifically, all pay documents and most termination reports that could be
7 located, were produced by April 23, 2008, the date they were due. A few termination reports from
8 individual stores were produced on April 24, 2008. All documents that could be located were
9 provided to Plaintiff within one day of the due date. Not all termination reports could be located,
10 however. Should any more be found, they will be provided as supplemental discovery.

11
12
13
14 **I declare that the above statements are true to the best of my knowledge and belief, and**
15 **that I understand that it is made for use as evidence in court and is subject to penalty for**
16 **perjury.**

17
18 Dated: May 6, 2008

19 
20 Leigh Ann Collins Tift

CERTIFICATE OF SERVICE


I hereby certify that on May 6, 2008, I served a full, true, and correct copy of the foregoing
**DECLARATION OF LEIGH ANN COLLINGS TIFT IN SUPPORT OF DEFENDANT'S
OBJECTIONS TO ATTORNEY FEE REQUEST AND MEMORANDUM IN SUPPORT
THEREOF**

- ☐ By delivery via messenger, or otherwise by hand,
☐ By facsimile,
☒ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By 
Savanna L. Stevens

Firmwide:85130068.1 013306.2124

EXHIBIT 1

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6 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
7 **FOR THE COUNTY OF MULTNOMAH**

8 **MICHAEL MIGIS, et al.,**

Case No. 0711-13531

9
10 Plaintiff,

11 v.

12 **AUTOZONE, INC.,**

**DECLARATION OF CHEY K.
POWELSON SUPPORTING
PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
EXTENSION OF TIME**

13
14 Defendant.
15

16 I, Chey K. Powelson, hereby declare as follows:

- 17 1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter,
18 and base the contents of this declaration on my own personal knowledge and/or the
19 litigation files and documents my firm maintains for this litigation.
- 20 2. After the Court's ruling during the April 8, 2008 hearing on Plaintiff's expedited
21 *Motion to Enforce Court Order*, Plaintiff's counsel (Chey Powelson and Bud Bailey)
22 conferred with AutoZone attorney Neil Olsen in the Court's jury room. During that
23 conference, I asked Mr. Olsen to produce the "summary report" in electronic Excel
24 format. Mr. Olsen refused on the grounds that the Court did not order any such
25 production.
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6 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
7 **FOR THE COUNTY OF MULTNOMAH**
8

9 **MICHAEL MIGIS**, individually, and on
10 behalf of all others similarly situated,

11 Plaintiff,

12 v.

13 **AUTOZONE, INC.**,

14 Defendant.
15

Case No. 0711-13531

**PLAINTIFF'S SECOND MOTION
FOR ORDER COMPELLING
DISCOVERY**

Date: **June 30, 2008**

Time: 9:00 a.m.

Court: The Hon. Jerome LaBarre

Rm: 702

16
17 **REQUEST FOR ORAL ARGUMENT:** Pursuant to UTCR 5.050, Plaintiff estimates
18 the time needed for oral argument to be 15 minutes. Court reporter services are not required.

19 **UTCR 5.010 CERTIFICATION OF COMPLIANCE:** Plaintiff's counsel certifies he
20 made good faith efforts to confer and did confer with opposing counsel to resolve the issues in
21 this *Motion*, but the parties are unable to reach resolution. See *Declaration of Chey K. Powelson*
22 (*"Powelson Decl."*), ¶ 2.

23 **I. MOTION**

24 **PLAINTIFF MICHAEL MIGIS**, through his attorneys, moves this Court for an order
25 compelling Defendant AutoZone to, within ten (10) calendar days of hearing on this matter,
26

1 produce the following:

- 2 1. One year of electronic time records for all hourly Oregon AutoZone employees
- 3 2. All documents and reports reflecting weekly summarization of hours worked by
- 4 Plaintiff Migis, including the "Payroll Weekly Hours Summary Report."

6 II. ARGUMENT & AUTHORITIES

7 A. Overview

8 "[I]f a party in response to a request for inspection submitted under Rule 43 fails to permit
9 inspection as requested, the discovering party may move for an order compelling discovery in
10 accordance with the request." ORCP 46A(2). "[A]n evasive or incomplete answer is to be treated
11 as a failure to answer. ORCP 46A(3).

12 1. Plaintiff's Third Set of Requests For Production

13 Defendant responded to Plaintiff's Third Set of Discovery Requests on or about May 5,
14 2008. *Powelson Decl.*, Ex. A. Defendant's document production was lacking, however, and
15 despite two discovery conferences on the matter, Defendant did not produce additional
16 documents. *Id.*, ¶ 2.

17 2. April 2, 2008 Court Order

18 The Court's Order on Plaintiff's *First Motion for Order Compelling Discovery* required
19 AutoZone to produce:

20 *[A]ll documents and reports reflecting any weekly summarization of hours worked by*
21 *Plaintiff, whether individually or by inclusion in a larger group, for the period of time*
from three (3) years prior to the filing of the Complaint, up to present.

22 See *Powelson Decl.*, Exs. B (Order) and C ((Plaintiff's Second Set RFP No. 6) (italics added).

23 During discovery conferences on this issue, Plaintiff referred Defendant's counsel to
24 *Joarnt v. AutoZone* documents, including a "Payroll Weekly Hours Summary Report." *Powelson*
25 *Decl.*, Exs. D - E. Unfortunately, the parties made no substantial progress, and Defendant did not
26

1 produce any Reports.

2 Due to the time-lines at issue in this case, Plaintiff must move to compel. If however,
3 Defendant finds and produces additional responsive documents prior to hearing, the parties will
4 inform the Court of that production.

5
6 **B. Hourly AutoZone (Individual) Employee Time Electronic Records (RFP No. 5,**
7 **Third Set)**

8 Plaintiff's Request For Production No. 5 reads as follows:

9 Produce in electronic format all time sheets reflecting the hours each Oregon
10 hourly employee worked for Defendant, including but not limited to, all time
11 records, time cards, punch clock records, time sheets, work time schedules, for
12 the period of time from one (1) year prior to the filing of the Complaint,
13 through the date of that filing.

14 During the March 7, 2008 hearing on Plaintiff's first motion to compel, with assistance
15 from the Court and discussion on the record, the Court ordered allowed production of other,
16 certain pre-class certification for a one year time period. See *Powelson Decl.*, Ex. B (Order).

17 For purposes of further pursuing pre-class certification discovery, Plaintiff subsequently
18 propounded Request for Production No. 5, limited to one year. Plaintiff also sent Defendant's
19 counsel a follow-up letter clarifying that Plaintiff seeks these time records not in .pdf format, but
20 in "useable electronic format." *Powelson Decl.*, Ex. F.

21 In an effort to find some middle ground, during a subsequent discovery conference on
22 Request For Production No. 5, Plaintiff's counsel first asked Defendant's counsel Leigh Ann Tift
23 to stipulate to class certification. Ms. Tift declined. Plaintiff's counsel then asked Defendant
24 stipulate that Mr. Migis is an adequate class representative. *Powelson Decl.*, ¶ 6, and Ex. H. This
25 could have conceivably alleviated the need for production of other employees' time records, and
26

1 would also necessarily affect consideration of the "commonality" and "typicality" ORCP 32A
2 factors.

3 Defendant would not stipulate. So Plaintiff again requested the one year's worth of time
4 records. Defendant's counsel declined. Nonetheless, in another effort to compromise, Plaintiff's
5 counsel proposed a representative sampling of time records out of the one year timeframe.
6 *Powelson Decl.*, ¶ 6.

7 However, when Plaintiff asked Defendant's counsel to agree that AutoZone would *not*
8 leverage the sampling of records to somehow argue there was no numerosity, Defendant's
9 counsel declined. *Powelson Decl.*, ¶ 6.

10 Plaintiff also requested that Defendant stipulate that time records for one out of every
11 three employees over the course of one year would be representative of at least the entire year.
12 Defendant's counsel would not stipulate unless Plaintiff's counsel stipulated "first." *Powelson*
13 *Decl.*, ¶ 7. Unfortunately, a short time later during that same phone conference Defendant's
14 counsel Tift accused Plaintiff of never intending to any stipulation, and then sent Plaintiff a letter
15 to that same effect. *Id.*, ¶ 7, Exs. G - H.

16 During the parties' final discovery conference on this matter, although AutoZone offered
17 to produce time records for one in three Oregon hourly employees over one year, Plaintiff again
18 requested one year's worth of records for all employees, either (a) for one calendar year, or (b)
19 from four months for each of three years. Defendant would not produce time records for that
20 length of time. *Powelson Decl.*, ¶ 8. AutoZone is apparently refusing to produce an entire year's
21 worth on the grounds that such production would be unduly burdensome.

22 However, production of an entire year is not unduly burdensome for AutoZone for two
23 reasons. First, Defendant did not object to Request No. 5 on the grounds that it was unduly
24 burdensome. See *Powelson Decl.*, Ex. A (Defendant only objecting that the Request was "vague,
25 overbroad and irrelevant, and exceed[s] the proper scope of pre-class certification discovery.")
26

1 Second, in the *Joarnt v. AutoZone* case, AutoZone's Director of Payroll did not testify that
2 the process of gathering electronic time records for all Oregon AutoZone employees would be
3 unduly burdensome; rather he testified that the process would merely be cumbersome. *Powelson*
4 *Decl.*, Ex. I (Dessem Dep., 61:25 - 62:4).

5 The requested time records for all Oregon hourly employees are relevant to this putative
6 class action to show: a pattern and practice of AutoZone's conduct (ORCP 32A, 32B:
7 commonality, typicality, pre-domination of common issues), and to defend against Defendant's
8 anticipated argument that Mr. Migis is not an adequate class representative because: (a) the harm
9 he suffered is not common or typical of the class, and (b) he has no personal knowledge of how
10 AutoZone treated other hourly employees in other stores where Mr. Migis did not work.¹

11 The time records are also clearly important for the Court to determine whether this suit
12 is properly maintainable as a class action. Oregon Rule of Civil Procedure 32C mandates a court
13 "shall determine by order whether and with respect to what claims or issues [the suit] is to be so
14 maintained and shall find the facts specially and state separately its conclusions thereon."

15 In sum, the information Plaintiffs seeks in Request for Production No. 5: (1) does not
16 create an undue burden on Defendant; and (2) is relevant and important for the Court to determine
17 whether this suit can be maintained as a class action.

18 The Court should therefore compel AutoZone to produce its Oregon employees' time
19 records in useable electronic format dating back from one year prior to the filing of the
20 Complaint. Time is also of the essence due to the August 15, 2008 filing deadline for Plaintiff's
21 Motion for Class Certification Motion, as set forth in the Case Management Order.

22 ///

23 ///

24
25 ¹An entire year of records for all hourly employees will also make it easier to determine
26 the turnover rate, which can used to show numerosity and better determine the size of various
classes.

C. First Court Order That Defendant Produce All Documents and Reports Reflecting Any Weekly Summarization of Hours Worked by Plaintiff Migis (April 2, 2008 Court Order, ¶ 4(f)).

While in response to the Court Order Defendant produced many but not all of Plaintiff Migis's weekly "AutoZoner Time Cards"² for the time he worked in several different Oregon AutoZone stores, AutoZone did not produce any other types of documents and reports showing additional information about Mr. Migis's "hours worked."

For example, the "AutoZoner Time Card" shows only generally a week's worth of daily hours, clock in and clock out times, and any reasons for a change to those clock in and out times. However, the "Payroll Weekly Hours Summary Report" shows an employee's weekly regular hours, hours paid, and *total overtime*. *Powelson Decl.*, Exs. D - E. In addition, any hard copy documents produced and relating to Mr. Migis may have handwritten notes such as those produced in the *Joarnt* case. See *id.*

The documents therefore appear to be different enough to justify production, especially in light of the Court's Order that Defendant produce all, not just some, documents and reports.

Moreover, in response to preservation of evidence concerns raised by Plaintiffs in the *Joarnt v. AutoZone* case, after hearing in late January 2006 Judge Kantor ordered that AutoZone:

[W]ill preserve all contents of currently-existing (from November 2004 and later) Oregon AutoZone store "period boxes," or any future boxes that are created and maintained during the course of this lawsuit, for all AutoZone stores in the State of Oregon.

Powelson Decl., Ex. L (p. 2, ¶ 2. b.). A "period box" contains one month's worth of an AutoZone store's records.

///

² See e.g., *Powelson Decl.*, Exs. J - K (AutoZoner Time Cards).

1 Although Plaintiff Migis worked for AutoZone from approximately May 2002 to early
2 February 2006, it does not appear that AutoZone has produced all types of documents that exist
3 (or should exist pursuant to the Preservation Order) and would show various aspects of the hours
4 that Plaintiff Migis worked.

5 During the parties' discovery conference on this issue, Plaintiff referred Defendant to
6 different types of documents AutoZone was forced to produce (or allow inspection of) in the
7 *Joarnt* case. Among those types of documents found was the Payroll Weekly Hours Summary
8 Report.

9 That type of document was kept, at least at those stores where they were found, in period
10 boxes. Therefore, in light of Judge Kantor's Preservation Order and the length of Plaintiff
11 Migis's employment with AutoZone in Oregon, it necessarily follows that in this case AutoZone
12 should have produced *all types of documents* in response to the April 2, 2008 Court Order on
13 Plaintiff's Second Set Request For Production No. 2.

14 Additional, hard copy documents—as well as that same information in readable electronic
15 information—relating to Mr. Migis should exist. Plaintiff respectfully requests production of that
16 information as this Court already ordered.

17 **III. CONCLUSION**

18 Plaintiff respectfully requests the Court grant all relief requested herein because the
19 information is relevant to the subject matters in this lawsuit and important for pre-class
20 certification.

21
22 DATED this 23rd day of May 2008.

BAILEY, PINNEY & ASSOCIATES, LLC

23
24 
25 A.E. "BUD" BAILEY, OSB 87157
26 CHEY POWELSON, OSB 03551
Attorneys for Plaintiffs

**Declaration of Chey K. Powelson
Plaintiff's Second Motion to Compel
Discovery**

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5
6 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
7 **FOR THE COUNTY OF MULTNOMAH**

8
9 **MICHAEL MIGIS, et al.,**

Case No. 0711-13531

10 Plaintiff,

11 v.

**DECLARATION OF CHEY K.
POWELSON SUPPORTING
PLAINTIFF'S SECOND MOTION
FOR ORDER COMPELLING
DISCOVERY**

12 **AUTOZONE, INC.,**

13
14 Defendant.
15
16

17 I, Chey K. Powelson, hereby declare as follows:

- 18 1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter,
19 and base the contents of this declaration on my own personal knowledge and/or the
20 litigation files and documents my firm maintains for this litigation.
- 21 2. On or about May 8, 2008, I conferred via telephone with Defendant's counsel Leigh
22 Ann Tift on various discovery issues, including several relating to Defendant's
23 responses to Plaintiff's Third Set of Requests For Production. Attached hereto as
24 **Exhibit A** is a true and correct copy of portions of those responses. On or about May
25 21, 2008, I again conferred with Defendant's counsel Ms. Amy Alpern and Leigh
26

Page 1 -

**DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
ORDER COMPELLING DISCOVERY**

1 Ann Tift on various issues relating to Defendant's responses to Plaintiff's Third Set
2 of Requests For Production. The outcome of both conferences did not result in
3 complete resolution of several discovery issues, including those set forth in Plaintiff's
4 *Second Motion for Order Compelling Discovery*. The parties made no substantial
5 progress, and Defendant did not produce any Reports as they relate to Mr. Migis.

6 3. Attached hereto as **Exhibit B** is a true and correct copy of the Court's Order on
7 Plaintiff's First Motion for an Order Compelling Discovery, for which the Court
8 ordered Defendant to produce "all documents responsive to the Requests," including
9 Plaintiff's Second Set of Requests For Production No. 6. Attached hereto as **Exhibit**
10 **C** is a true and correct copy of an excerpt of Defendant's responses to Plaintiff's
11 Second Set of Requests For Production, including Request No. 6.

12 4. Attached hereto as **Exhibits D and E** are true and correct copies of two "Payroll
13 Weekly Hours Summary Report[s]" Defendant produced in the *Joarnt v. AutoZone*
14 matter. These reports were kept in AutoZone period boxes, as indicated by the prefix
15 to the Bates numbers. These reports are a matter of public record, filed in the *Joarnt*
16 case.

17 5. Attached hereto as **Exhibit F** is a true and correct copy of my April 1, 2008 faxed
18 letter to Defendant's counsel Neil Olsen, in which I reiterated that for Plaintiff's
19 Third Set of Requests For Production No. 5 (employee time records), Plaintiff was
20 requesting that information in useable electronic format.

21 6. Attached hereto as **Exhibit G** is a true and correct copy of Defendant counsel Tift's
22 May 8, 2008 follow-up letter to me, in regards to our discovery conference that day,
23 and during which Ms. Tift accused me of never intending to consider one out of three
24 employee time records for the time period Plaintiff requested in Request for
25 Production No. 5 (Third Set). I did ask Ms. Tift during that conference whether
26

Page 2 -

**DECLARATION OF CHEYK. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
ORDER COMPELLING DISCOVERY**

1 Defendant would stipulate to class certification, or that Mr. Migis is an adequate
2 class representative; she declined to both requests. I then again asked her to produce
3 one year's worth of time records as requested in RFP No. 5. She declined. In
4 another effort to compromise, proposed a representative sampling of time records out
5 of the one year time-frame. During that discussion I asked Defendant's counsel Tift
6 to agree that AutoZone would *not* leverage the sampling of records to somehow
7 argue there was no numerosity, but Defendant's counsel declined.

8 7. Also during the May 8 discovery conference with Ms. Tift I requested whether
9 Defendant would stipulate that time records for one out of every three employees
10 over the course of one year would be representative of at least the entire year.
11 Defendant's counsel would not stipulate unless I stipulated "first." Unfortunately,
12 a short time later during that same phone conference, there was a breakdown in
13 communication resulting in Defendant's counsel Tift accusing me of never intending
14 to accept anything less than one year's worth of time records. See Exhibit G (Tift
15 letter to Plaintiff). Attached hereto as Exhibit H is my May 9, 2008 follow-up letter
16 to the May 8 discovery conference, and e-mail by which I sent that letter as an
17 attachment.

18 8. During the parties' final discovery conference on this matter on May 21, 2008,
19 although AutoZone's counsel offered to produce time records for one in three Oregon
20 hourly employees over one year, Plaintiff again requested one year's worth of records
21 for all employees, either (a) for one calendar year, or (b) from four months for each
22 of three years. Defendant would not produce time records for that length of time.

23 9. Attached hereto as Exhibit I is a true and correct copy of excerpts from the August
24 25, 2006 deposition of AutoZone Director of Payroll Mark Dessem, in which he
25 testified as to the process of compiling Oregon hourly employee time records (or
26

Page 3 -

**DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
ORDER COMPELLING DISCOVERY**

reports).

10. Attached hereto as **Exhibits J and K** are true and correct copies of Plaintiff Migis's "AutoZoner Time Card[s]," which show only generally the date of each clock in and out time, total daily hours, total weekly hours, and any reason for a change to the time record. It does not appear to show discrete "overtime hours" worked, as opposed to **Exhibits D and E**, above.

11. Attached hereto as **Exhibit L** is a true and correct copy of Judge Henry Kantor's *Order on Plaintiffs' Motions For Order Requiring Defendant to Preserve Evidence* and other motions, issued in the *Joarnt v. AutoZone* case (Mult. Co. Case No. 0503-02795) and directing AutoZone to preserve all period boxes from November 2004 and on an ongoing basis.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated this 23rd day of May 2008 at Vancouver, Washington.


CHEY POWELSON, OSB 03551
Attorney for Plaintiff

Page 4-

DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR ORDER COMPELLING DISCOVERY

Exhibit A

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, *et al.*

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

(Filed as a Class Action)

DEFENDANT'S RESPONSES TO
PLAINTIFF'S THIRD SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS

TO: Defendant AutoZone, Inc., c/o your attorneys Douglas Parker and Neil Olsen, 1750 SW Harbor Way, Ste 450, Portland OR 97201

Plaintiff hereby requests that Defendant make the following documents, as requested in Exhibit "A," available for inspection and copying at the time, date and place set forth below:

TIME, DATE AND PLACE FOR PRODUCTION

TIME: 5:00 p.m.

DATE: April 25, 2008

PLACE: Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Ste 290
Vancouver, WA 98683

///

///

EXHIBIT A
Page 1

DEFINITIONS

a. The term "document" or "documents" as used herein is to be construed broadly and shall mean any kind of hard copy and/or electronic written, recorded or graphic matter in any form of physical media, however produced or reproduced, of any kind of description, whether sent or received or neither, including originals, non-identical copies (whether different from the original because of marginal notes, or other material inserted therein or attached thereto, or otherwise), drafts and both sides thereof, including, but not limited to: agreements, communications, correspondence, telegrams, cables, telex messages, electronic mail messages ("e-mail"), memoranda, records, books, summaries of records or personal conversations or interviews, desk calendars, appointment books, diaries, journals, forecasts, statistical statements, tabulations, accountants' work papers, graphs, charts, accounts, analytical records, affidavits, minutes, records or summaries of meetings or conferences, reports or summaries of interviews or telephone conversations, reports or summaries of investigations, opinions or reports of consultants, appraisals, records, reports or trade letters, press releases, contracts, notes, projections, drafts of any documents, working papers, checks (front and back), check stubs or receipts, sound recordings, data processing records, microfilm, photographs, maps, financial statements or reports thereof, promissory notes, loan agreements, loan files and all notes contained with loan files, revolving credit agreements, deeds of trust, guaranty agreements or indemnification agreements, real estate contracts for sale or lease, pleadings, or any other documents or writings of whatever description, including any information contained in any computer (even if not previously printed out) within the custody or control of you or any of your employees, agents, including attorneys, accountants, investment bankers or advisors, or any other person acting or purporting to act on your behalf.

1 b. Produce all non-identical copies of all responsive documents including copies that
2 bear marks, notations or changes not present on the original.

3 c. If any documents are withheld on grounds of attorney/client privilege or attorney
4 work product immunity, identify the author, each recipient thereof, the nature of the document and
5 the basis upon which the privilege is asserted.
6

7 d. If any document requested was, but no longer is in the possession, custody, or
8 control of Defendant, or in existence, state whether it (a) is missing or lost, (b) has been
9 destroyed, (c) has been transferred, voluntarily or involuntarily, to others, or (d) has been otherwise
10 disposed of. For each such instance, explain the circumstances surrounding such disposition, give
11 the date or approximate date thereof, and the names and last known home and business addresses of
12 these persons with knowledge of such circumstances.
13

14 e. "Defendant" as used herein refers to all parties named in this action, and all agents,
15 employees or other persons with an interest in any party.

16 f. These Requests For Production are continuing and, in the event you discover further
17 information that is responsive to them, you must supplement your responses. If you fail to
18 supplement your responses in a reasonable fashion, requestor will move the Court for an order
19 excluding from evidence at trial any matter which is responsive and not furnished.
20

21 g. The phrase "Electronic Data" includes information from Defendant's computer
22 systems, removable electronic media and other locations. This further includes, but is not limited to,
23 all documents, text files, e-mail and other electronic communication (including logs of e-mail history
24 and usage, header information and "deleted" files), word processing documents, spreadsheets,
25 databases, calendars, telephone logs, fax logs, alarm or security logs or records, video security or
26

1 earlier Requests for Production, notable AZ/Migis 0001621-1655.
2
3

4 **REQUEST FOR PRODUCTION NO. 3:** Produce any and all Daily Coverage Lists for (or used in
5 or by) all Oregon AutoZone stores, for the period of time from two (2) years prior to the filing of the
6 Complaint, through the date of that filing.
7

8 **RESPONSE:** These documents are not retained for the period requested.
9
10

11 **REQUEST FOR PRODUCTION NO. 4:** Produce all documents and reports reflecting any weekly
12 summarization of hours worked by AutoZone hourly employees in stores located in the State of
13 Oregon, for the period of time from two (2) years prior to the filing of the Complaint, through the
14 date of that filing.
15

16 **RESPONSE:** See, attached disk, identified as AZ/Migis 0002214.
17
18

19 **REQUEST FOR PRODUCTION NO. 5:** Produce in electronic format all time sheets reflecting
20 the hours each Oregon hourly employee worked for Defendant, including but not limited to, all time
21 records, time cards, punch clock records, time sheets, work time schedules, for the period of time
22 from one (1) year prior to the filing of the Complaint, through the date of that filing.
23

24 **RESPONSE:** Objection. This Request is vague, overbroad and irrelevant, and exceed the
25 proper scope of pre-certification discovery. Defendant will produce the records should a class be
26

1 certified.

2
3 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents that are, or that reference
4 Defendant's policies, procedures, and/or practices containing, referencing, or otherwise relating to
5 the review, correction, modification, alteration, and/or approval (by any AutoZone employee) of
6 time cards and hours worked by AutoZone hourly employees in Oregon, in effect for the time period
7 three (3) years prior to the filing of the Complaint in this matter, through the date of that filing.
8

9 **RESPONSE:** See, generally, documents identified in Response to RFP No. 7.
10
11

12 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents, reflecting, containing, or
13 otherwise relating to any and all discussions (including communications in any form) between, or
14 any training given or taken by, any AutoZone employees, regarding the hours worked (including but
15 not limited to start and end times, rest breaks, meal periods, and overtime) by AutoZone hourly
16 Oregon employees, during the period of time from two (2) years prior to the filing of the Complaint,
17 through the date of that filing.
18

19 **RESPONSE:** See, AZ/Migis 0001882-00002213.
20
21
22

23 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that are, or that reflect, contain or
24 otherwise relate to any and all policies, procedures, and/or practices implemented, modified or
25 changed, and/or any other actions taken, directed, approved, reviewed or otherwise implemented by
26

1 response to the complaint of *Joarnt et al. v. AutoZone*. See, also, pleadings filed by Plaintiff which
2 acknowledge that "some people may be members of both classes," identified, for this purpose, as
3 AZ/Migis 0002216-2218.
4
5
6

7 Dated: May 5, 2008
8

9 
10 Leigh Ann Collings Tift OSB No. 06473
11 LITTLER MENDELSON
12 A Professional Corporation

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Attorneys for Defendant
Autozone Inc.

Exhibit B

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY
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ENTERED
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IN REGISTER BY EG

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

ORDER ON PLAINTIFF'S FIRST
MOTION FOR AN ORDER
COMPELLING DISCOVERY, AND
DETERMINING THE SUFFICIENCY
OF DEFENDANT'S RESPONSES TO
PLAINTIFF'S REQUESTS FOR
ADMISSION

~~PROPOSED~~

THIS MATTER having come before this Court upon Plaintiff's First Motion for an Order Compelling Discovery, and Determining the Sufficiency of Defendant's Responses to Plaintiff's Requests for Admission, and the Court having heard oral argument on March 7, 2008, reviewed the file, and being fully advised of the premise thereof, for the reasons stated on the record:

It is HEREBY ORDERED that:

- (1) Plaintiff's motion to deem Plaintiff's Requests For Admissions admitted is DENIED.
- (2) Defendant produce all documents in response to Request For Production Nos. 2, 4 and 6 in Plaintiff's First Set of Requests For Production, within 15

1 business days from the date of hearing on this matter, provided that these
2 Requests shall be limited to Oregon-based AutoZone employees paid on an hourly
3 basis.

4
5 (3) Defendant produce all documents responsive to Request For Production Nos.
6 7 and 8 in Plaintiff's Second Set of Requests for Production, within 15 business
7 days from the date of hearing on this matter.

8
9 (4) The parties confer on the scope of production for Request For Production Nos.
10 1 - 6 in Plaintiff's Second Set of Requests For Production. The Court has
11 subsequently been informed that Plaintiff and Defendant agree to the scope of
12 those Requests as follows, and Defendant shall produce all documents responsive
13 to the Requests, as modified, within 20 business days from the date of hearing on
14 this matter.

15 (a) Request No. 1 (transportation and driving policies and/or procedures): The
16 temporal scope of this Request shall be a total of one (1) year comprised of
17 the following time periods: from May 1, 2005 through August 2005; from
18 November 1, 2005 through February 2006; and from May 1, 2006 through
19 August 2006. This Request will be limited to documents representing a
20 complete set of the requested policies and procedures from the earliest date
21 set forth above, through the latest date set forth above, inclusive of any
22 changes to those policies and procedures.

23 (b) Request No. 2 (mileage reimbursement policy and/or procedure): The
24 temporal scope of this Request shall be a total of one (1) year comprised of
25 the following time periods: from May 1, 2005 through August 2005; from
26 November 1, 2005 through February 2006; and from May 1, 2006 through

1 August 2006. This Request will be limited to documents representing a
2 complete set of the requested policies and procedures from the earliest date
3 set forth above, through the latest date set forth above, inclusive of any
4 changes to those policies and procedures.

5 (c) Request No. 3 (merchandise and/or parts delivery and pick-up schedule(s)):

6 No changes; Defendant shall respond to the Request as drafted.

7 (d) Request No. 4 (documents and reports including Missed Lunch Reports and

8 Lunch Variance Reports): The temporal scope of this Request will be a total
9 of one (1) year comprised of the following time periods: from May 1, 2005
10 through August 2005; from November 1, 2005 through February 2006; and
11 from May 1, 2006 through August 2006.

12 (e) Request No. 5 (Weekly Schedule reports referencing Plaintiff Migis's

13 approved and unapproved work schedules): No changes; Defendant shall
14 respond to the Request as drafted.

15 (f) Request No. 6 (documents and reports reflecting weekly summarization of

16 hours worked by Plaintiff Migis): No changes; Defendant shall respond to the
17 Request as drafted.

18
19 SIGNED on this 2 day of April 2008.

20
21
22 THE HON. JEROME LABARRE
23 Multnomah Co. Circuit Court
24
25
26

1 APPROVED AS TO FORM:
2 BAILEY, PINNEY & ASSOCIATES, LLC
3

4 /s/
A.E. "BUD" BAILEY, OSB NO. 87157
5 bbailey@wagelawyer.com
CHEY K. POWELSON, OSB NO. 03551
6 cpowelson@wagelawyer.com
1498 SE Tech Center Pl, Ste 290
7 Vancouver, WA 98683
Phone: 360.567.2551
8 Fax: 360.567.3331
Attorneys for Plaintiff
9

10 LITTLER MENDELSON
11

12 /s/
13 DOUG PARKER, OSB NO. 821017
NEIL OLSEN, OSB NO. 053378
14 LITTLER MENDELSON, P.C.
1750 S.W. Harbor Way, Suite 450
15 Portland, Oregon 97201
Phone: 503-221-0309
16 Fax: 503-242-2457
Of Attorneys for Defendant
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Page 4 - ORDER ON PLAINTIFF'S FIRST MOTION FOR ORDER COMPELLING DISCOVERY

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law
1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

EXHIBIT B
Page 4

Exhibit C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S FIRST SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
PLAINTIFF'S SECOND SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Defendant AutoZone, Inc. ("Defendant") hereby submits its objections and responses to
Plaintiff's Second Set of Requests for Production of Documents as follows:

GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this
lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery
requests to the extent they purport to require any actions not required by the Oregon Rules of Civil
Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this
objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope
of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to
lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation
greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests
to the extent they call for information or documents that fall within any relevant privilege (including

PAGE 1 -- DEFENDANT'S 1ST SUPPL. OBJECTIONS AND RESPONSE
TO PLAINTIFF'S SECOND RFP'S

Littler Mendelson, PC
1750 SW Harbor Way, Suite 450
Portland, OR 97201
Phone: 503-221-0200 Fax: 503-242-2450

EXHIBIT C

Page 143

1 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents and reports reflecting
2 any weekly summarization of hours worked by Plaintiff, whether individually or by inclusion in a
3 larger group, for the period of time from three (3) years prior to the filing of the Complaint, up to
4 present.

5 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
6 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
7 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
8 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
9 Yamaoka's Fourth Requests for Production, RFP No. 9, in Cause No. 053-02795.

10 **SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, *see*, attached AZ/MIGIS
11 000552-000707.

12
13
14 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents or records such as
15 security logs, or records, identifying when a security system in any AutoZone store in which
16 Plaintiff worked was activated and/or deactivated during Plaintiff's employment period.

17 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
18 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
19 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
20 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
21 Yamaoka's Fourth Requests for Production, RFP No. 11, in Cause No. 053-02795.


22 **SUPPLEMENTAL RESPONSE:** Defendant will produce these logs.
23
24
25
26

1 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that identify, or which
2 record or can be used to identify, the names of the persons activating and/or deactivating security
3 systems at stores in which Plaintiff worked for AutoZone during Plaintiff's employment period.

4 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
5 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
6 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
7 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
8 Yamaoka's Fourth Requests for Production, RFP No. 12, in Cause No. 053-02795.

9 **SUPPLEMENTAL RESPONSE:** Defendant has been unable to identify records related to
10 Plaintiff Migis responsive to this request. Defendant continues to search and will supplement to the
11 extent that records are identified.

12
13 Dated: March 28, 2008

14
15 
16 Leigh Ann Collings Tift OSB 05473
17 Douglas S. Parker OSB No.82101
18 LITTLER MENDELSON
19 A Professional Corporation

20
21 Attorneys for Defendant
22 Autozone Inc.
23
24
25
26

Exhibit D

MAY-23-2008 15:54

BAILEY PINNEY

Payroll Weekly Hours Summary Report

*** AutoZone 2229 ***

01/08/2005

21:08:48

Page 1

AUTOZONER	REG HRS	VAC HRS	INV HRS	PRG NSW	TRN HRS	COM HRS	OTH HRS	HRS PD	TOT OT
BAZANKE, PEDRO	17:50	-	-	-	-	-	-	17:50	-
EVANS, JASON	13:26	-	-	-	-	-	-	13:26	-
FLORES, JAVIER	11:23	-	-	-	-	-	-	11:23	-
GENERIC MAIL US	-	-	-	-	-	-	-	-	-
HAMILTON, DANIE	11:14	-	-	-	-	-	-	11:14	-
HAYASHI, PATRIC	38:19	-	-	-	-	-	-	38:19	-
LUNA, NOE	15:16	-	-	-	-	-	-	15:16	-
MARTINEZ, GUADA	11:14	-	-	-	-	-	-	11:14	-
NARAYAN, RAJ	37:56	-	-	-	-	-	-	37:56	-
REYES, MARTIN	38:10	-	-	-	-	-	-	38:10	-
SUHL, DAVID	40:30	-	-	-	6:00	-	-	46:30S	-
Total	235:18	-	-	-	6:00	-	-	241:18	-

AUTOZONER	MAINT TECH	TRUCK DR	CONTR SEC	OTHER HRS
11-1111	-	0:04	-	-
84-9333	5:47	-	-	-

S - Salaried Autozoner.

AZPB000812

EXHIBIT D
Page 1

Exhibit E

Per 12 wk
Payroll Weekly Hours Summary Report *** AutoZone 2229 *** 07/12/2003
21:09:04
Page 1

AUTOZONER	REG HRS	VAC HRS	INV HRS	SCK HRS	PRG NEW	TRN HRS	COM HRS	OTH HRS	HRS FD	TOT OT
ASTORIAS,	12:01	-	-	-	-	-	-	-	12:01	-
CABRERA,	8:12	-	-	-	-	-	-	-	8:12	-
COSTACHE,	42:02	-	-	-	-	-	-	-	42:02	(3202)
FLORES, J	28:50	-	-	-	-	-	-	-	28:50	-
GENERIC M	-	-	-	-	-	-	-	-	-	-
LAVIOLETTE	29:19	-	-	-	-	-	-	-	29:19	-
NARAYAN,	39:35	-	-	-	-	-	-	-	39:35	(3202)
NAVA GOMEZ	20:40	-	-	-	-	-	-	-	20:40	-
SALTORS,	7:00	-	-	-	-	-	-	-	7:00	-
SUEL, DAY	50:00	-	-	-	-	-	-	-	50:00	-
Total	237:39	-	-	-	-	-	-	13:27	251:06	8:44

AUTOZONER.	MAINT TECH	TRUCK DR	CONTR SEC	OTHER HRS
99-9999	-	0:23	-	-

8 - Salaried AutoZoner.

AZPB001520

EXHIBIT *E*

Page *1*

Exhibit F

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

CHEY POWELSON

Telephone (360) 567-2551
Facsimile (360) 567-3331
e-mail: CPowelson@wagelawyer.com

* Washington License WWSA 34593
* Oregon License OSB 03551

April 1, 2008

VIA FAX & MAIL: (503) 961-7854

Mr. Neil Olsen
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

Re: *Migis v. AutoZone, Inc.*
(Mult. Co. Cir. Court No. 0711-13531)

Neil:

To clarify, for Plaintiff's Request For Production No. 5 (employee time records) in the Third Set of discovery requests, the phrase "electronic format" means usable electronic format, not .pdf, as AutoZone retains that information or as can otherwise be extracted using a mainframe database extraction program, such as OnDemand 32.

Please call me to discuss this issue, or if you have any other questions. Thanks.

Sincerely yours,



Chey K. Powelson
Attorney for Plaintiffs

EXHIBIT F
Page 1

MAY-23-2008 15:55

BAILEY PINNEY

P.037

***** -COMM. JOURNAL- ***** DATE APR-01-2008 ***** TIME 14:01 *****

* MODE = MEMORY TRANSMISSION

START=APR-01 14:00

END=APR-01 14:01

FILE NO.=848

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	2	15039617854	002/002	00:00:33

-BAILEY PINNEY

***** UF-8000 v2 ***** -3605673331

- ***** -

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

Tel: 1-800-482-8351
Fax: 360-567-3331

CS

April 1, 2008

PERSONAL AND CONFIDENTIAL

TO: Olsen, Neil

FAX NO. (503) 961-7854

Number of Pages (including cover page): 2

RE: *Migis v. Autozone*

Electronic Format

IF YOU DID NOT RECEIVE ALL PAGES, CONTACT ME IMMEDIATELY AT (360) 567-2551

COMMENTS: ORIGINAL DOCUMENTS
Regular mail

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EXHIBIT

F.

Page

2

Exhibit G

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

2/4



May 8, 2008

Leigh Ann Tift
Direct: 206.381.4905
Direct Fax: 206.447.6965
lft@littler.com

VIA MAIL AND FACSIMILE

Chey Powelson
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: *Migis v. AutoZone, Inc.*
Multnomah County Circuit Court Case No. 0711-13531

Dear Mr. Powelson:

This is in response to your most recent letter regarding the second 39C deposition notice and our discovery conference this morning. In your letter of May 2, 2008 regarding the location of the 39C deposition, you state: "Defendant still appears to be under the impression that it must produce one or more ORCP 39C(6) designees who are 'qualified' to testify based upon their personal knowledge [in response to these notices]."

We do not believe that the witnesses need to testify on the basis of personal knowledge. I am well aware that corporate knowledge of a witness will suffice for this purpose. I am also well aware of the requirement that the corporation produce the most qualified person to testify on its behalf. See, *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 798 (9th Cir. 2003); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 17 (1st Cir. 2000) (corporation must identify person who best speaks for it on 30(b)(6) subjects). As I have explained to you numerous times, AutoZone's payroll employees, and specifically the person knowledgeable about the subjects you identify in your deposition notice, all live and work in Memphis. None are resident in the state of Oregon. AutoZone cannot teach its store managers or area managers in Oregon an area entirely outside their job responsibilities and then designate them as a person best able to speak to AutoZone payroll policies and programs and will not do so. The second 39C designee will be available for deposition in Memphis. If you want to take a telephone or video deposition, that is acceptable to us.

You asked about the designee for the first 39C deposition and whether that person will be prepared to speak to all subjects in the notice—you specifically mentioned AutoZone's defense of laches, and your contention that the company must produce a fact witness to show that it was materially harmed by delay. I maintain that most of what you spoke of is legal theory, or application of law to facts, but to the extent that the witness can testify without

Chey Powelson
May 8, 2008
Page 2

disclosing attorney client communications or work product, we will produce an appropriate witness next week.

With respect to the lengthy discovery conference this morning, lasting more than 1 1/2 hours, please note that I have offered to look at documents you designate to see if we will stipulate to their authenticity. You indicate you feel you should not have to spend the time identifying these documents, but did, eventually, ask that I review Bates-labeled documents AZ/Migis 282-294 and something you called the "Q-2 earnings report." I've looked at Bates labeled documents AZ/Migis 282-294, and we will stipulate that these documents, and any others that are titled "Employee 200_ [inserting the noted year and quarter] Earnings Record" are what they purport to be—that is, a report of an employee's earnings by quarter. You asked that I also stipulate that "everything like them" is authentic. I'm not able to enter into such a stipulation, but if you want to identify documents, or even Bates ranges, I will, as I said, look at them and give you our answer.

You asked that AutoZone produce all of Mr. Migis' work schedules. As I think you know, from the previous case, AutoZone managers do not always retain work schedules. A work schedule is a plan—it does not represent the actual hours worked. AutoZone does keep proper records of hours worked, but does not necessarily keep work schedules. I believe you have what there is to produce in regard to Mr. Migis' past work schedules, but if there are schedules that are located as this case progresses, we will produce them. The same is true for any other documents that are located and are responsive to discovery requests.

You asked for an electronic copy of the lunch variance report we sent you in hard copy. I will have a disk sent to you.

You asked me to send a corrected copy of my declaration in support of our opposition to the motion for attorney fees. If I mistakenly attributed a conversation to the wrong day, I will make sure the court is aware of the mistake.

You suggested that AutoZone did not produce all emails relative to your RFP # 2 because, you posit, AutoZone managers "must be emailing" one another "all the time" about wage and hour matters. I told you I'd seen nothing that would lead me to believe that was true. You also seem to forget that this Request does not ask about emails about "wage and hour matters," it is much more specific than that. You asked me if I include all HR managers when I said I had not seen anything that led me to believe your hypothesis was correct, and I responded, and want to reiterate, that we are talking about specific discovery requests, not my personal opinions—or yours—about the content of email traffic within AutoZone.

You suggested that AutoZone had not complied with its obligation to provide Plaintiff with a "weekly summarization of hours" in response to RFP No. 4. AutoZone provided Plaintiff with exactly what was requested.

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

4/4

Chey Powelson

May 8, 2008

Page 3

We had an extended discussion about Plaintiff's demand for every time record for every employee employed by AutoZone in Oregon for the one year period preceding the filing of the Migis complaint. You initially asked if AutoZone would stipulate to class certification. We will not. Next, you suggested that you would agree to accept 1 out of every 5th employee's records, if I would stipulate that that sample was representative. I asked if you would also stipulate that those records were representative, which you declined to do. You then changed your mind and said you would accept 1 out of every 3rd employee's records if I would stipulate that the records were representative, but again declined to do so on behalf of Plaintiff. Next you said you might consider that stipulation if I would agree you could depose the person who randomly selected the employee's whose records were produced. Ultimately, you changed your mind about that, too, and said you intended to move to compel all time records for all employees.

Finally, I am compelled to address the conclusion of our conversation. I felt that the conversation degenerated into comments that were completely unprofessional and sometimes bizarre (the "metaphysical truth" part, for example). I would appreciate it if you would refrain from this kind of conversation in the future. I think that these discovery conference should be much briefer and more to the point.

Sincerely,


Leigh Ann Tift

cc: Tanya Holmes
Amy Alpern

Firmwide:85145353.1 013306.2124

EXHIBIT 6
Page 3

MAY-23-2008 15:56

BAILEY PINNEY

P.042

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

1/4



FACSIMILE COVER SHEET

May 8, 2008

To: Chey K. Powelson
Bailey, Pinney & Associates, LLC

Fax: 360.567.3331 Phone: 360.567.2551

Fax #(s) verified before sending (initial):

From: Leigh Ann Tift

Fax: 206.447.6965 Phone: 206.381.4905

Length, including this cover letter: 4 Pages

If you do not receive all pages, please call Savanna L. Stevens at 206.381.4932.

Message:

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One Union Square, 600 University Street, Suite 3200, Seattle, WA 98101.3122 Tel: 206.623.3300 Fax: 206.447.6965, www.littler.com

EXHIBIT

Page

6

4

Exhibit H

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
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* Oregon License OSB 03551

May 9, 2008

VIA E-MAIL ONLY

Ms. Leigh Ann Tift
ltift@littler.com
One Union Square
600 University St, Ste 3200
Seattle, WA 98101-3122

Re: Migis v. AutoZone, Inc. (Multnomah Co. Circuit Court No. 0711-13531)
Follow-up to 05-08-08 Telephonic Discovery Conference

Ms. Tift:

This is to follow up what we discussed yesterday morning in our phone conversation on various discovery issues.

Proposed Stipulation to the Authenticity of Defendant's Own Documents

In regards to the issues in my April 23 letter, you refused to stipulate to Plaintiff propounding additional Requests For Admission to determine the authenticity of all documents Defendant has produced (and which appear to be business records).

You then requested that I give you a list of documents Plaintiff would like Defendant to stipulate to in regards to authenticity. I gave you certain examples, which you identify in your follow up letter of yesterday, and agreed to stipulate to (the "everything like them" I referred to in the conference are in fact those "Employee 200_" documents you identified in your letter).

As for the remaining categories of documents, please stipulate to the authenticity of the following categories of documents:

1. AZ/MIGIS 0000295 - 486 (SMS Time Final Historical Reports)
2. AZ/MIGIS 0000487 - 550 (driving policies)
3. AZ/MIGIS 0000551 (meal period report)
4. AZ/MIGIS 0000552 - 707 (SMS Time Final Historical Reports)

EXHIBIT H
Page 1

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008

2

5. AZ/MIGIS 0000708 - 753 (SMS Time Final Historical Reports)
6. AZ/MIGIS 0000754 - 1211 (security/alarm logs)
7. AZ/MIGIS 0001220 - 1235 (meal period report)
8. AZ/MIGIS 0001236 - 1252 (travel policy)
9. AZ/MIGIS 0001253 - 1288 (meal period report)
10. AZ/MIGIS 0001289 - 1346 (AutoZoner Time Cards)
11. AZ/MIGIS 0001347 (Termination Report) ; AZ/MIGIS 0001348 - 1457 (Job Data)
12. AZ/MIGIS 0001458 - 1620 (Job/Pay Data)
13. AZ/MIGIS 0001621 - 1655 (AutoZone Store Handbook)
14. AZ/MIGIS 0001656 - 1817 (Paycheck Data)
15. AZ/MIGIS 0001818 - 1881 (Termination Reports)
16. AZ/MIGIS 0001882 - 2037 (*Foundations* manuals/handbooks)
17. AZ/MIGIS 0002038 - 2068 (Being a Manager)
18. AZ/MIGIS 0002069 - 2213 (Being a Manager)
19. AZ/MIGIS 0002214
20. AZ/MIGIS 0002215 (Mark Dessem e-mail)
21. AZ/MIGIS 0000001 - 294 ("Personnel file")

Otherwise, Defendant will not stipulate to Plaintiff propounding Requests For Admission beyond the number the Oregon Rules permit.

Work Schedules and Management Action Plans

Per my April 28 letter (and relating to a Court Order on this matter), I inquired as to whether Defendant will produce additional work schedules relating to Mr. Migis. I referenced Judge Kantor's preservation order in the *Joarnt* case, and surmised that those schedules should have been retained.

EXHIBIT H
Page 2

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008
3

I also referenced Defendant's non-production of any "Payroll Weekly Hours Summary Reports," which shows a store's employees' names, regular hours worked and paid, and any overtime hours paid. I referenced *Joarni* document production as an example: AZPB0001520.

Again, this is information Defendant should have retained pursuant to Judge Kantor's preservation order, and also produced in this case in response to the Court's Order on Plaintiff's Second Set of Requests For Production 5 - 6.

Nonetheless, you represented Defendant had made a diligent search, and although Defendant has complied with the Court's Order referenced above, Defendant will continue to look for responsive documents.

Missed Lunch and Lunch Variance Reports

You committed to producing these reports in Excel format, to the extent AutoZone has it.

Additional Termination Reports in Response to the Second Court Order

Defendant has produced all such reports it has located. I nonetheless indicated that due to the non-production of approximately 96 Termination Reports, Plaintiff in his supplemental briefing to the Court will request additional relief, based on the non-production of this information.

This non-production becomes even more important because: (a) the information exists electronically in the summary report (Bates No. AZ/MIGIS 0001212, *et seq.*), and (b) Defendant represented to the Court that only by producing the Termination Reports would Defendant be able to show that the apparent "late pays" on the summary report were not really late.

Defendant's Declaration Supporting Objection to Plaintiff's Attorneys' Fees

I urged correction of this document, so as to avoid any undue and un-necessary confusion at hearing on this matter. You committed to correcting the declaration if and where appropriate.

Defendant's Responses to Plaintiff's Third Set of RFPs

1. RFP Nos. 1 - 2: You stated that the Mark Dessem e-mail (0002215) is the only one that presumably exists.

I also disagree with your follow up letter of yesterday; during the conference I did not say that managers are e-mailing all the time on wage and hour issues, but are probably e-mailing all the time (I referred to you Bates No. 0002159 re: "Communication"), and such e-mails should include wage and hour issues.

Ms. Leigh Ann Tift - *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)

09 May 2008

4

It is very unlikely Oregon AutoZone managers have never, for the time period referenced, sent or received any e-mail or memoranda on employee hours, wages and the like in Oregon.

2. **RFP No. 3:** You represented Defendant could not find Daily Coverage Lists (reports) at present. Again, this is concerning in light of Defendant's prior preservation obligations.
3. **RFP No. 4** (all documents and reports reflecting any weekly summarization of hours worked by AutoZone employees): You represented that Defendant has fully complied with this discovery request by producing *one* report in Excel format. I strongly disagreed because the Request seeks "all documents and reports," not one report.

I further requested that Defendant produce more relevant documents such as the "Payroll Weekly Hours Summary Report," and referenced the *Joarnt* document production by way of example: AZPB0001520, 1463, and 0000812.

5. **RFP No. 5:** I asked you to stipulate to class certification if AutoZone is refusing to produce one year's worth of time records. You refused and stated that we have Plaintiff's own time records. I therefore requested that Defendant stipulate to Plaintiff's records as representative of the entire class, and that he is an adequate class representative (including having suffered common and typical claims).

You refused that offer as well, at which point I again requested the time records. In an effort to brainstorm to an amicable solution, I proposed production of a random selection of, for example, one out of four or five, provided Defendant would stipulate that such time records would be representative of the one year's worth. You said no.

I stated that if you could not stipulate then Plaintiff would have to compel the entire year's worth of records. You then asked me if I would stipulate to the time records being representative; I was unsure whether I could do that because Defendant, not Plaintiff, is in the best position to know whether those records are truly representative.

I also asked that if I did stipulate, would Defendant not use that to somehow oppose numerosity or the like. You could not agree to that, so I proposed one out of every three people, provided that Defendant allow Plaintiff to depose the IT person who compiles that those time records.

I then agreed to send you a proposal in writing, but in your follow up letter you are under the impression that I would not send a proposal. Therefore, please consider the proposal withdrawn; Plaintiff will move to compel.

6. **RFP Nos. 6 - 8:** You represented Defendant has produced everything thus far located, but will produce additional documents to the extent they are found.

EXHIBIT 14
Page 4

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008
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You further stated that you didn't find that AutoZone managers e-mail each other about wage and hour issues. Rather, you represented that Defendant "communicates" via policies, handbooks and training.

I further referred you to *Joarnt* document production as an example of other documents that Defendant should have produced: AZ 1010, 1012.

7. RFP No. 9: We could not agree as to this issue; I reiterated the reasoning in my May 1 letter.
8. RFP No. 10: I asked whether you had the opportunity to read the *AutoZone, Inc. v. Ferrell Air Conditioning & Heating*, case, but you had not. You represented that discovery is ongoing.
9. RFP Nos. 11 - 13: We were not able to make any headway on issues related to these Requests.

Finally, in regards to your comments on the conference degenerating into unprofessional matters such as my reference to "metaphysical truth," you seemed rather interested in that topic, which I initially mentioned only in passing on the rhetorical question of whether a stipulation actually makes something true.

In the future and for your convenience I will refrain making any references that could be construed as humor. You are correct to imply that this is a serious matter.

For my convenience and in the spirit of professionalism, however, I would ask you refrain from injecting an undue number of sarcastic comments into the conversation (e.g., asking me if I need help spelling), as it does not contribute positively to the issues at hand.

Overall, however, though we disagree on many matters, I think you'll agree it could be worse.

Thank you for your patience, and I look forward to further conferences with you.

Sincerely,

/s/

Chey K. Powelson
Attorney for Plaintiff

EXHIBIT H
Page 5

Chey Powelson

From: Chey Powelson
Sent: Friday, May 09, 2008 3:08 PM
To: Tift, Leigh Ann C.
Cc: Bud Bailey; Brad Griffin; Charity Shindle; Alpern, Amy R.
Subject: Migis v. AutoZone – Follow up to 05-08-08 Disc. Conf.
Follow Up Flag: Follow up
Flag Status: Red
Attachments: To Defendant_Follow Up Disc Conf_05-09-2008.pdf

Ms. Tift:

See attached letter. Thanks.

Chey K. Powelson
Attorney at Law
Bailey, Pinney & Assoc., LLC
1498 SE Tech Center Pl, Ste 290
Vancouver, WA 98683
Cpowelson@wagelawyer.com
360.567.2551 (Ph)
360.567.3331 (Fax)

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5/23/2008

EXHIBIT H
Page 10

Exhibit I

Deposition of MARK DESSEM, taken on August 25, 2005

Page 1

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH

3 RICHARD JOARNT AND BERT YAMAOKO,
4 individually, and on behalf of all
5 others similarly situated PLAINTIFFS
6 VS. NO. 0503-02795
7 AUTOZONE, INC., a Foreign Corporation DEFENDANT
8

9 *****

10 DEPOSITION OF MARK DESSEM

11 *****

12
13
14
15 TAKEN AT THE INSTANCE OF THE PLAINTIFFS
16 IN THE OFFICES OF THE SHELBY COUNTY COURTHOUSE
17 40 ADAMS AVE. RM
18 ON AUGUST 25, 2005,

19 (APPEARANCE)
20
21

22 Reported by: REGINA D. F

23 ADVANCED C

24 P.O. BOX 761
25 TUPELO, MS 38802-0761
(662) 690-1500

Deposition of MARK DESSEM, taken on August 25, 2005

Page 2

1 APPEARANCES:

2 For the Plaintiffs: A. E. BUD BAILEY, ESQUIRE
Bailey, Pinney & Associates, LLC
3 Columbia Tech Center
1498 SE Tech Center Place
4 Suite 290
Vancouver, Washington 98683
5 (360) 567-2551
6

For the Defendant: LEIGH ANN COLLINGS TIFT, ESQUIRE
7 Littler Mendelson
701 Fifth Avenue, Suite 6500
8 Seattle, Washington 98104-7097
(206) 623-3300
9

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Deposition of MARK DESSEM, taken on August 25, 2005

Page 61

1 in and manipulate that.

2 Q. So this report that we've seen in Exhibit 1
3 and Exhibit 3, is that the payroll register?

4 A. No. No. This is a time card.

5 Q. These are just time card reports?

6 A. Yes.

7 Q. Okay. When you do a payroll register then,
8 your record then is a 48,000 employee record. Is it
9 an alpha record? I mean, is it all by -- first of
10 all, is it a 48,000 employee record?

11 A. No.

12 Q. Is it set up that way?

13 A. Well, ultimately on the entire report,
14 everybody is going to appear. But it is first, I
15 believe, broken down by what we call pay group, which
16 is going to separate people into different pay
17 groups. And then within pay group, it would be
18 broken down, I believe, by store.

19 Q. Okay. So if you had the store numbers for
20 each geographic area by state, would it be possible
21 to manipulate that record to be able to just provide
22 all the individuals that were working in Oregon, for
23 example, for a given period of time, whether it be
24 one pay period or for several pay periods?

25 A. Yes. It could be done. It would be

Deposition of MARK DESSEM, taken on August 25, 2005

Page 62

1 cumbersome to do it, because you'd have to go in and
2 work your way around and basically do screen prints
3 and that sort of thing. But you could probably get
4 to where you were --

5 Q. Do you know whether or not there is a
6 separate data system that's used to maintain
7 personnel information that, on a particular snapshot
8 day, that -- for example, a list of all the employees
9 that work in a particular geographic area, such as
10 Oregon, could be identified and printed out all at
11 once?

12 A. Again, if you're -- ask that again? On a
13 given day? Who worked on a given day?

14 Q. Yes. Or, even more specific, if we have a
15 period from a date back so many years, we want to
16 know all the names of the people who worked in
17 Oregon, is there a payroll or personnel record that's
18 kept by computer that stores that information that
19 could be downloaded and printed?

20 A. Outside of the payroll register, it would
21 be difficult. I'm not saying it can or can't be
22 done. Again, that's more of an IT thing, because
23 you're trying to go into the system and pull data
24 out. And if I'm understanding you, you're saying,
25 hey, I want to see all the people that worked in

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT AND BERT YAMAOKO,
individually, and on behalf of all
others similarly situated

PLAINTIFFS

VS.

NO. 0503-02795

AUTOZONE, INC., a Foreign Corporation

DEFENDANT

DEPOSITION OF MARK DESSEM

TAKEN AT THE INSTANCE OF THE PLAINTIFFS
IN THE OFFICES OF THE SHELBY COUNTY COURTHOUSE
40 ADAMS AVE. RM 228, MEMPHIS, TENNESSEE
ON AUGUST 25, 2005, BEGINNING AT 8:55 A.M.

(APPEARANCES NOTED HEREIN)

Reported by: REGINA D. RUSSELL, CSR 1110

ADVANCED COURT REPORTING
P.O. BOX 761
TUPELO, MS 38802-0761
(662) 690-1500

ORIGINAL

C E R T I F I C A T E

STATE OF MISSISSIPPI)

COUNTY OF LEE)

RE: ORAL DEPOSITION OF MARK DESSEM

I, Regina D. Russell, CSR 1110, a Notary Public within and for the aforesaid county and state, duly commissioned and acting, hereby certify that the foregoing proceedings were taken before me at the time and place set forth above; that the statements were written by me in machine shorthand; that the statements were thereafter transcribed by me, or under my direct supervision, by means of computer-aided transcription, constituting a true and correct transcription of the proceedings; and that the witness was by me duly sworn to testify to the truth and nothing but the truth in this cause.

I further certify that I am not a relative or employee of any of the parties, or of counsel, nor am I financially or otherwise interested in the outcome of this action.

Witness my hand and seal on this 1st day of September, 2005.

My Commission Expires: CSR 1110
May 27, 2008 Notary Public

Exhibit J

AutoZoner Time Card

*** AutoZone 2236 ***

11/19/2005
21:17:06
Page 1

AutoZoner Name: MIGIS, MICHAEL

AutoZoner ID: 10090549

Day Of Week	Date	Daily Hours	Clock In	Clock Out	Change Reason
Sunday	11/13/2005	7:03	11:12	15:42	
			16:53	19:26	
Monday	11/14/2005	0:01	19:27	19:27	
Tuesday	11/15/2005	-			
Wednesday	11/16/2005	5:56	7:39	13:35	
Thursday	11/17/2005	7:37	12:41	17:06	
			18:10	21:22	
Friday	11/18/2005	8:38	7:37	12:48	
			14:02	17:29	
Saturday	11/19/2005	7:08	12:58	16:20	
			17:30	21:16	
Total Hours		36:23			

AutoZoner Signature: _____

Management Signature: _____

Store Copy

EXHIBIT

Page

AZ/MIGIS 0001333

Exhibit K

AutoZoner Time Card

*** AutoZone 2236 ***

09/03/2005

21:44:52

Page 1

AutoZoner Name: MIGIS, MICHAEL

AutoZoner ID: 10090549

Day Of Week	Date	Daily Hours	Clock In	Clock Out	Change Reason
Sunday	08/28/2005	7:41	22:18	9:41	-11:23 AutoZoner Failed To Clock Out
			10:57	16:12	
			17:06	19:30	
Monday	08/29/2005	-			
Tuesday	08/30/2005	-			
Wednesday	08/31/2005	8:10	12:41	16:58	
			17:48	21:41	
Thursday	09/01/2005	7:52	21:42	21:44	
			13:06	16:47	
			17:46	21:10	
			21:10	21:56	
Friday	09/02/2005	9:46	7:37	17:23	
Saturday	09/03/2005	7:48	12:55	16:56	
			17:56	21:43	
Total Hours		41:17			

AutoZoner Signature: _____

Management Signature: _____

Store Copy

EXHIBIT K
Page 1

AZ/MIGIS 0001323

Exhibit L

ENTERED
MAR 29 2006
IN REGISTER BY RK

FILED
06 MAR 27 AM 11:23
CLERK OF COURT
FOR MULTNOMAH COUNTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT and BERT
YAMAOKO, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

No. 0503-02795

ORDER ON PLAINTIFFS' MOTIONS
FOR ORDER REQUIRING
DEFENDANT TO PRESERVE
EVIDENCE AND FOR PROTECTIVE
ORDER, AND ON DEFENDANT'S
MOTION TO ENJOIN PLAINTIFFS
FROM CONTACTING
REPRESENTED PARTIES AND
MOTION FOR PROTECTIVE
ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS
MEMBERS

THIS MATTER, having come before the Court upon Plaintiffs' and Defendant's above-referenced Motions, and the Court having reviewed the file, and being fully advised of the premise thereof during hearing of these Motions on January 27, 2006; the Court hereby **ORDERS** that:

1. Defendant's Motion to Enjoin Plaintiffs from Contacting Represented Parties and Motion for Protective Order Limiting Plaintiffs' Contact with Putative Class Members, is **DENIED**. Plaintiffs are allowed to conduct investigation and contact AutoZone employees and store managers as part of such investigation; **PROVIDED**, however, that such contact include a disclosure that the investigation is related to the employee's experience as an hourly employee. **MOREOVER**, Plaintiffs are not entitled to directly contact current district managers or other current employees occupying positions of authority above the district manager level, regarding this case without permission of Defendant and/or the Court except to

Page 1 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS' CONTACT WITH PUTATIVE CLASS MEMBERS

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 587-2551 • Fax (360) 587-2221

EXHIBIT L

Page 1-3

1 determine if the person is a district manager or other person with whom contact is restricted.
2 Defendant shall provide Plaintiffs with a list of such individuals whom Defendant believes
3 Plaintiffs are not entitled to contact, PROVIDED, HOWEVER, that Defendant's duty to
4 provide this information is STAYED in accordance with Paragraph 4 of this Order.

5 2. In regards to Plaintiffs' Motion for Order Requiring Defendant to Preserve
6 Evidence and Motion for Protective Order:

7 a. Plaintiffs' Motion for Protective Order (restricting Defendant's
8 communications with putative class members) is **DENIED**. Defendant may conduct
9 investigation to prosecute and defend their claims and defenses; PROVIDED, however,
10 Defendant does not try to persuade any putative class members to not participate in the class.

11 b. Plaintiffs' Motion for Order Requiring Defendant to Preserve Evidence
12 is hereby **GRANTED** to the extent that Defendant will preserve all contents of currently-
13 existing (from November 2004 and later) Oregon AutoZone store "period boxes," or any
14 future boxes that are created and maintained during the course of this lawsuit, for all
15 AutoZone stores in the State of Oregon. FURTHERMORE, Defendant will arrange for the
16 storage of those boxes and their contents in such a way that provides Plaintiffs reasonable
17 access to review and copy the contents of those boxes. Plaintiffs are not entitled to documents
18 containing confidential information that is entirely unrelated to the claims or defenses in this
19 lawsuit. If the parties disagree over the discoverability of one or more documents contained
20 in any of the period boxes, Plaintiffs are entitled to copy that document or documents and
21 move the Court for a ruling as to the disputed document or documents' discoverability.

22 3. All requests for costs and attorneys fees and/or sanctions as made in the above-
23 referenced Motions are **DENIED**.

24 ///

25 ///

26 ///

Page 2 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS MEMBERS

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683

EXHIBIT

Page

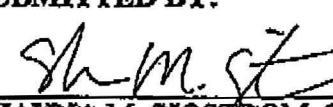
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2-3

1 4. This case is STAYED in its entirety pending resolution of Plaintiff's appeal of
 2 this Court's order on Defendant's Motion for Judgment on the Pleadings. This stay, however,
 3 does not affect the parties' respective rights to conduct appropriate investigation.

4
 5 ORDERED this 24th day of March 2006.

6
 7 
 8 THE HONORABLE HENRY KANTOR
 9 MULTNOMAH CO. CIRCUIT COURT JUDGE

10 SUBMITTED BY:

11 
 12 SHAUNA M. SJOSTROM, OSB 04418
 13 Of Attorney for Plaintiffs

14
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 Page 3 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
 AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
 CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
 CONTACT WITH PUTATIVE CLASS MEMBERS

BAILEY PINNEY & ASSOCIATES LLC
 Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683

EXHIBIT L

Page 3-3

BAILEY, PINNEY & ASSOCIATES, LLC

**Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683**

Tele: 1-800-882-8351
Fax: 360-567-3331

CS

May 23, 2008

PERSONAL AND CONFIDENTIAL

TO: Ms. Amy R. Alpern

FAX NO. (503) 914-1816

Number of Pages (including cover page): *64*

RE: *Migis v. Autozone*

Plt 2nd Motion to Compel

IF YOU DID NOT RECEIVE ALL PAGES, CONTACT ME IMMEDIATELY AT (360) 567-2551

COMMENTS: ORIGINAL DOCUMENTS
Regular mail

NOTICE TO RECIPIENT

The information contained in this facsimile is intended only for the use of the individual or entity named above and may contain attorney privileged information. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify me by telephone (collect calls will be accepted) and destroy the information contained in this facsimile.

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY

08 MAY 23 PM 4: 56

FILED

ENTERED

JUN 02 2008

IN REGISTER B.J.L.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, *et al.*

Case No. 0711-13531

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

DECLARATION OF CHEY K.
POWELSON SUPPORTING
PLAINTIFF'S SECOND MOTION
FOR ORDER COMPELLING
DISCOVERY

I, Chey K. Powelson, hereby declare as follows:

1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter, and base the contents of this declaration on my own personal knowledge and/or the litigation files and documents my firm maintains for this litigation.
2. On or about May 8, 2008, I conferred via telephone with Defendant's counsel Leigh Ann Tift on various discovery issues, including several relating to Defendant's responses to Plaintiff's Third Set of Requests For Production. Attached hereto as **Exhibit A** is a true and correct copy of portions of those responses. On or about May 21, 2008, I again conferred with Defendant's counsel Ms. Amy Alpern and Leigh

Page 1 -

DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
ORDER COMPELLING DISCOVERY

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

1 Ann Tift on various issues relating to Defendant's responses to Plaintiff's Third Set
 2 of Requests For Production. The outcome of both conferences did not result in
 3 complete resolution of several discovery issues, including those set forth in Plaintiff's
 4 *Second Motion for Order Compelling Discovery*. The parties made no substantial
 5 progress, and Defendant did not produce any Reports as they relate to Mr. Migis.

6 3. Attached hereto as **Exhibit B** is a true and correct copy of the Court's Order on
 7 Plaintiff's First Motion for an Order Compelling Discovery, for which the Court
 8 ordered Defendant to produce "all documents responsive to the Requests," including
 9 Plaintiff's Second Set of Requests For Production No. 6. Attached hereto as **Exhibit**
 10 **C** is a true and correct copy of an excerpt of Defendant's responses to Plaintiff's
 11 Second Set of Requests For Production, including Request No. 6.

12 4. Attached hereto as **Exhibits D and E** are true and correct copies of two "Payroll
 13 Weekly Hours Summary Report[s]" Defendant produced in the *Joarnt v. AutoZone*
 14 matter. These reports were kept in AutoZone period boxes, as indicated by the prefix
 15 to the Bates numbers. These reports are a matter of public record, filed in the *Joarnt*
 16 case.

17 5. Attached hereto as **Exhibit F** is a true and correct copy of my April 1, 2008 faxed
 18 letter to Defendant's counsel Neil Olsen, in which I reiterated that for Plaintiff's
 19 Third Set of Requests For Production No. 5 (employee time records), Plaintiff was
 20 requesting that information in useable electronic format.

21 6. Attached hereto as **Exhibit G** is a true and correct copy of Defendant counsel Tift's
 22 May 8, 2008 follow-up letter to me, in regards to our discovery conference that day,
 23 and during which Ms. Tift accused me of never intending to consider one out of three
 24 employee time records for the time period Plaintiff requested in Request for
 25 Production No. 5 (Third Set). I did ask Ms. Tift during that conference whether
 26

Page 2 -

**DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
 ORDER COMPELLING DISCOVERY**

1 reports).

2 10. Attached hereto as **Exhibits J and K** are true and correct copies of Plaintiff Migis's
 3 "AutoZoner Time Card[s]," which show only generally the date of each clock in and
 4 out time, total daily hours, total weekly hours, and any reason for a change to the time
 5 record. It does not appear to show discrete "overtime hours" worked, as opposed to
 6 **Exhibits D and E**, above.

7 11. Attached hereto as **Exhibit L** is a true and correct copy of Judge Henry Kantor's
 8 *Order on Plaintiffs' Motions For Order Requiring Defendant to Preserve Evidence*
 9 ~~and other motions, issued in the *Joarnt v. AutoZone* case (Mult. Co. Case No. 0503-~~
 10 ~~02795) and directing AutoZone to preserve all period boxes from November 2004~~
 11 ~~and on an ongoing basis.~~

12
 13 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
 14 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
 15 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR
 16 PERJURY.

17
 18 Dated this 23rd day of May 2008 at Vancouver, Washington.

19
 20 
 21 CHEY POWELSON, OSB 03551
 22 Attorney for Plaintiff
 23
 24
 25
 26

Page 4 -

DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
 ORDER COMPELLING DISCOVERY

Exhibit A

1
2
3 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
4 **FOR THE COUNTY OF MULTNOMAH**
5

6 **MICHAEL MIGIS, et al.**

7 Plaintiff,

8 v.
9

10 **AUTOZONE, INC.,**

11 Defendant.
12

Case No. 0711-13531

(Filed as a Class Action)

**DEFENDANT'S RESPONSES TO
PLAINTIFF'S THIRD SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

13 **TO: Defendant AutoZone, Inc., c/o your attorneys Douglas Parker and Neil Olsen, 1750 SW**
14 **Harbor Way, Ste 450, Portland OR 97201**

15 Plaintiff hereby requests that Defendant make the following documents, as requested in
16 Exhibit "A," available for inspection and copying at the time, date and place set forth below:
17

18 **TIME, DATE AND PLACE FOR PRODUCTION**

19 **TIME:** 5:00 p.m.

20 **DATE:** April 25, 2008

21 **PLACE:** Bailey Pinney & Associates LLC
22 1498 SE Tech Center Place, Ste 290
23 Vancouver, WA 98683

24 ///

25 ///

26

EXHIBIT A

Page 1

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
One Union Square
500 University Street, Suite 2200
Seattle, WA 98101-3122
206.422.2200

DEFINITIONS

a. The term "document" or "documents" as used herein is to be construed broadly and shall mean any kind of hard copy and/or electronic written, recorded or graphic matter in any form of physical media, however produced or reproduced, of any kind of description, whether sent or received or neither, including originals, non-identical copies (whether different from the original because of marginal notes; or other material inserted therein or attached thereto; or otherwise), drafts and both sides thereof, including, but not limited to: agreements, communications, correspondence, telegrams, cables, telex messages, electronic mail messages ("e-mail"), memoranda, records, books, summaries of records or personal conversations or interviews, desk calendars, appointment books, diaries, journals, forecasts, statistical statements, tabulations, accountants' work papers, graphs, charts, accounts, analytical records, affidavits, minutes, records or summaries of meetings or conferences, reports or summaries of interviews or telephone conversations, reports or summaries of investigations, opinions or reports of consultants, appraisals, records, reports or trade letters, press releases, contracts, notes, projections, drafts of any documents, working papers, checks (front and back), check stubs or receipts, sound recordings, data processing records, microfilm, photographs, maps, financial statements or reports thereof, promissory notes, loan agreements, loan files and all notes contained with loan files, revolving credit agreements, deeds of trust, guaranty agreements or indemnification agreements, real estate contracts for sale or lease, pleadings, or any other documents or writings of whatever description, including any information contained in any computer (even if not previously printed out) within the custody or control of you or any of your employees, agents, including attorneys, accountants, investment bankers or advisors, or any other person acting or purporting to act on your behalf.

b. Produce all non-identical copies of all responsive documents including copies that bear marks, notations or changes not present on the original.

c. If any documents are withheld on grounds of attorney/client privilege or attorney work product immunity, identify the author, each recipient thereof, the nature of the document and the basis upon which the privilege is asserted.

d. If any document requested was, but no longer is in the possession, custody, or control of Defendant, or in existence, state whether it (a) is missing or lost, (b) has been destroyed, (c) has been transferred, voluntarily or involuntarily, to others, or (d) has been otherwise disposed of. For each such instance, explain the circumstances surrounding such disposition, give the date or approximate date thereof, and the names and last known home and business addresses of these persons with knowledge of such circumstances.

e. "Defendant" as used herein refers to all parties named in this action, and all agents, employees or other persons with an interest in any party.

f. These Requests For Production are continuing and, in the event you discover further information that is responsive to them, you must supplement your responses. If you fail to supplement your responses in a reasonable fashion, requestor will move the Court for an order excluding from evidence at trial any matter which is responsive and not furnished.

g. The phrase "Electronic Data" includes information from Defendant's computer systems, removable electronic media and other locations. This further includes, but is not limited to, all documents, text files, e-mail and other electronic communication (including logs of e-mail history and usage, header information and "deleted" files), word processing documents, spreadsheets, databases, calendars, telephone logs, fax logs, alarm or security logs or records, video security or

earlier Requests for Production, notable AZ/Migis 0001621-1655.

REQUEST FOR PRODUCTION NO. 3: Produce any and all Daily Coverage Lists for (or used in or by) all Oregon AutoZone stores, for the period of time from two (2) years prior to the filing of the Complaint, through the date of that filing.

RESPONSE: These documents are not retained for the period requested.

REQUEST FOR PRODUCTION NO. 4: Produce all documents and reports reflecting any weekly summarization of hours worked by AutoZone hourly employees in stores located in the State of Oregon, for the period of time from two (2) years prior to the filing of the Complaint, through the date of that filing.

RESPONSE: See, attached disk, identified as AZ/Migis 0002214.

REQUEST FOR PRODUCTION NO. 5: Produce in electronic format all time sheets reflecting the hours each Oregon hourly employee worked for Defendant, including but not limited to, all time records, time cards, punch clock records, time sheets, work time schedules, for the period of time from one (1) year prior to the filing of the Complaint, through the date of that filing.

RESPONSE: Objection. This Request is vague, overbroad and irrelevant, and exceed the proper scope of pre-certification discovery. Defendant will produce the records should a class be

1 certified.

2
3 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents that are, or that reference
4 Defendant's policies, procedures, and/or practices containing, referencing, or otherwise relating to
5 the review, correction, modification, alteration, and/or approval (by any AutoZone employee) of
6 time cards and hours worked by AutoZone hourly employees in Oregon, in effect for the time period
7 three (3) years prior to the filing of the Complaint in this matter, through the date of that filing.

8 **RESPONSE:** *See, generally, documents identified in Response to RFP No. 7.*

9
10
11
12 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents, reflecting, containing, or
13 otherwise relating to any and all discussions (including communications in any form) between, or
14 any training given or taken by, any AutoZone employees, regarding the hours worked (including but
15 not limited to start and end times, rest breaks, meal periods, and overtime) by AutoZone hourly
16 Oregon employees, during the period of time from two (2) years prior to the filing of the Complaint,
17 through the date of that filing.

18 **RESPONSE:** *See, AZ/Migis 0001882-00002213.*

19
20
21
22 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that are, or that reflect, contain or
23 otherwise relate to any and all policies, procedures, and/or practices implemented, modified or
24 changed, and/or any other actions taken, directed, approved, reviewed or otherwise implemented by
25
26

1 response to the complaint of *Joarnt et al. v. AutoZone*. See, also, pleadings filed by Plaintiff which
2 acknowledge that "some people may be members of both classes," identified, for this purpose, as
3 AZ/Migis 0002216-2218.
4

5
6
7 Dated: May 5, 2008

8
9 
10 Leigh Ann Collings Tift OSB No. 05473
11 LITTLER MENDELSON
12 A Professional Corporation

13
14
15
16
17 Attorneys for Defendant
18 Autozone Inc.
19
20
21
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24
25

Exhibit B

jm

ENTERED
APR - 7 2008
IN REGISTER BY EG

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY
08 APR -3 AM 11:54
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Case No. 0711-13531

MICHAEL MIGIS, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

ORDER ON PLAINTIFF'S FIRST
MOTION FOR AN ORDER
COMPELLING DISCOVERY, AND
DETERMINING THE SUFFICIENCY
OF DEFENDANT'S RESPONSES TO
PLAINTIFF'S REQUESTS FOR
ADMISSION

~~PROPOSED~~



THIS MATTER having come before this Court upon Plaintiff's *First Motion for an Order Compelling Discovery, and Determining the Sufficiency of Defendant's Responses to Plaintiff's Requests for Admission*, and the Court having heard oral argument on March 7, 2008, reviewed the file, and being fully advised of the premise thereof, for the reasons stated on the record:

It is HEREBY ORDERED that:

- (1) Plaintiff's motion to deem Plaintiff's Requests For Admissions admitted is DENIED.
- (2) Defendant produce all documents in response to Request For Production Nos. 2, 4 and 6 in Plaintiff's First Set of Requests For Production, within 15

1 business days from the date of hearing on this matter, provided that these
2 Requests shall be limited to Oregon-based AutoZone employees paid on an hourly
3 basis.

- 4
5 (3) Defendant produce all documents responsive to Request For Production Nos.
6 7 and 8 in Plaintiff's Second Set of Requests for Production, within 15 business
7 days from the date of hearing on this matter.

- 8
9 (4) The parties confer on the scope of production for Request For Production Nos.
10 1 - 6 in Plaintiff's Second Set of Requests For Production. The Court has
11 subsequently been informed that Plaintiff and Defendant agree to the scope of
12 those Requests as follows, and Defendant shall produce all documents responsive
13 to the Requests, as modified, within 20 business days from the date of hearing on
14 this matter.

- 15 (a) Request No. 1 (transportation and driving policies and/or procedures): The
16 temporal scope of this Request shall be a total of one (1) year comprised of
17 the following time periods: from May 1, 2005 through August 2005; from
18 November 1, 2005 through February 2006; and from May 1, 2006 through
19 August 2006. This Request will be limited to documents representing a
20 complete set of the requested policies and procedures from the earliest date
21 set forth above, through the latest date set forth above, inclusive of any
22 changes to those policies and procedures.

- 23 (b) Request No. 2 (mileage reimbursement policy and/or procedure): The
24 temporal scope of this Request shall be a total of one (1) year comprised of
25 the following time periods: from May 1, 2005 through August 2005; from
26 November 1, 2005 through February 2006; and from May 1, 2006 through

Page 2 -

ORDER ON PLAINTIFF'S FIRST MOTION FOR ORDER COMPELLING DISCOVERY

August 2006. This Request will be limited to documents representing a complete set of the requested policies and procedures from the earliest date set forth above, through the latest date set forth above, inclusive of any changes to those policies and procedures.

(c) Request No. 3 (merchandise and/or parts delivery and pick-up schedule(s)):

No changes; Defendant shall respond to the Request as drafted.

(d) Request No. 4 (documents and reports including Missed Lunch Reports and

Lunch Variance Reports): The temporal scope of this Request will be a total of one (1) year comprised of the following time periods: from May 1, 2005 through August 2005; from November 1, 2005 through February 2006; and from May 1, 2006 through August 2006.

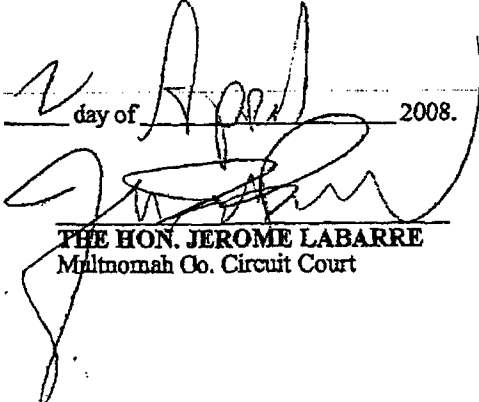
(e) Request No. 5 (Weekly Schedule reports referencing Plaintiff Migis's

approved and unapproved work schedules): No changes; Defendant shall respond to the Request as drafted.

(f) Request No. 6 (documents and reports reflecting weekly summarization of

hours worked by Plaintiff Migis): No changes; Defendant shall respond to the Request as drafted.

SIGNED on this 2 day of April 2008.


THE HON. JEROME LABARRE
Multnomah Co. Circuit Court

///

///

///

1 APPROVED AS TO FORM:

2 BAILEY, PINNEY & ASSOCIATES, LLC

3

4

/s/
A.E. "BUD" BAILEY, OSB NO. 87157
bbailey@wagelawyer.com
CHEY K. POWELSON, OSB NO. 03551
cpowelson@wagelawyer.com
1498 SE Tech Center Pl, Ste 290
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Attorneys for Plaintiff

9

10

LITTLER MENDELSON

11

12

/s/
DOUG PARKER, OSB NO. 821017
NEIL OLSEN, OSB NO. 053378
LITTLER MENDELSON, P.C.
1750 S.W. Harbor Way, Suite 450
Portland, Oregon 97201
Phone: 503-221-0309
Fax: 503-242-2457
Of Attorneys for Defendant

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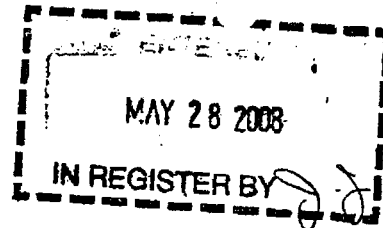
Page 4 -

ORDER ON PLAINTIFF'S FIRST MOTION FOR ORDER COMPELLING DISCOVERY

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law
1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

EXHIBIT B
Page 4

Exhibit C



IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,
Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,
Defendant.

No. 0711-13531

**DEFENDANT'S FIRST SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
PLAINTIFF'S SECOND SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Defendant AutoZone, Inc. ("Defendant") hereby submits its objections and responses to
Plaintiff's Second Set of Requests for Production of Documents as follows:

GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this
lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery
requests to the extent they purport to require any actions not required by the Oregon Rules of Civil
Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this
objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope
of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to
lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation
greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests
to the extent they call for information or documents that fall within any relevant privilege (including

PAGE 1 - DEFENDANT'S 1ST SUPPL. OBJECTIONS AND RESPONSE
TO PLAINTIFF'S SECOND REP'S

Littler Mendelson, PC
1750 SW Harbor Way, Suite 450
Portland, OR 97201
Phone: 503-221-0209 Fax: 503-242-2455

EXHIBIT C
Page 143

1 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents and reports reflecting
 2 any weekly summarization of hours worked by Plaintiff, whether individually or by inclusion in a
 3 larger group, for the period of time from three (3) years prior to the filing of the Complaint, up to
 4 present.

5 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 6 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 7 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
 8 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
 9 Yamaoka's Fourth Requests for Production, RFP No. 9, in Cause No. 053-02795.

10 **SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, *see*, attached AZ/MIGIS
 11 000552-000707.

12
 13
 14 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents or records such as
 15 security logs, or records, identifying when a security system in any AutoZone store in which
 16 Plaintiff worked was activated and/or deactivated during Plaintiff's employment period.

17 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 18 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 19 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
 20 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
 21 Yamaoka's Fourth Requests for Production, RFP No. 11, in Cause No. 053-02795.

22 **SUPPLEMENTAL RESPONSE:** Defendant will produce these logs.
 23
 24
 25
 26


1 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that identify, or which
2 record or can be used to identify, the names of the persons activating and/or deactivating security
3 systems at stores in which Plaintiff worked for AutoZone during Plaintiff's employment period.

4 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
5 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
6 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*

7 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
8 Yamaoka's Fourth Requests for Production, RFP No. 12, in Cause No. 053-02795.

9 **SUPPLEMENTAL RESPONSE:** Defendant has been unable to identify records related to
10 Plaintiff Migis responsive to this request. Defendant continues to search and will supplement to the
11 extent that records are identified.

12
13 Dated: March 28, 2008

14
15 
16 Leigh Ann Collings Tift OSB 05473
17 Douglas S. Parker OSB No. 82101
LITTLER MENDELSON
A Professional Corporation

18 Attorneys for Defendant
19 Autozone Inc.
20
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22
23
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Exhibit D

Payroll Weekly Hours Summary Report

*** AutoZone 2229 ***

01/08/2005

21:08:48

Page 1

AUTOZONER	REG HRS	VAC HRS	INV HRS	PRG NEW	TRN HRS	COM HRS	OTH HRS	HRS PD	TOT OT
BAZANTE, PEDRO	17:50	-	-	-	-	-	-	17:50	-
EVANS, JASON	13:26	-	-	-	-	-	-	13:26	-
FLORES, JAVIER	11:23	-	-	-	-	-	-	11:23	-
GENERIC MAIL US	-	-	-	-	-	-	-	-	-
HAMILTON, DANIE	11:14	-	-	-	-	-	-	11:14	-
HAYASHI, PATRIC	38:19	-	-	-	-	-	-	38:19	-
LUNA, NOE'	15:16	-	-	-	-	-	-	15:16	-
MARTINEZ, GUADA	11:14	-	-	-	-	-	-	11:14	-
NARAYAN, RAJ	37:56	-	-	-	-	-	-	37:56	-
REYES, MARTIN	38:10	-	-	-	-	-	-	38:10	-
SUHL, DAVID	40:30	-	-	-	6:00	-	-	46:30S	-

Total	235:18	-	-	-	6:00	-	-	241:18	-
-------	--------	---	---	---	------	---	---	--------	---

AUTOZONER	MAINT TECH	TRUCK DR	CONTR SEC	OTHER HRS
11-1111	-	0:04	-	-
84-9333	5:47	-	-	-

S - Salaried AutoZoner.

AZPB000812

EXHIBIT DPage 1

Exhibit E

Per 12 wk
 Payroll Weekly Hours Summary Report

*** AutoZone 2229 ***

07/12/2003

21:09:04

Page 1

AUTOZONER	REG HRS	VAC HRS	INV HRS	SCK HRS	PRG NEW	TRN HRS	COM HRS	OTH HRS	HRS PD	TOT OT
ASTURIAS,	12:01	-	-	-	-	-	-	-	12:01	-
CABRERA,	8:12	-	-	-	-	-	-	-	8:12	-
COSTACHE,	42:02	-	-	-	-	-	-	-	42:02	2:02
FLORES, J	28:50	-	-	-	-	-	-	-	35:10	-
GENERIC M	-	-	-	-	-	-	-	-	-	-
LAVIOLETT	29:19	-	-	-	-	-	-	-	29:19	-
NARAYAN,	39:35	-	-	-	-	-	-	-	46:42	6:42
NAVA GOME	20:40	-	-	-	-	-	-	-	20:40	-
SALTORS,	7:00	-	-	-	-	-	-	-	7:00	-
SUHL, DAV	50:00	-	-	-	-	-	-	-	50:00S	-

Total 237:39 - - - - - 13:27 251:06 8:44

AUTOZONER	MAINT TECH	TRUCK DR	CONTR SEC	OTHER HRS
99-9999	-	0:23	-	-

S - Salaried AutoZoner.

AZPB001520

EXHIBIT *E*Page *1*

Exhibit F

BALLEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law

1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

CHEY POWELSON

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Facsimile (360) 567-3331

e-mail: CPowelson@wagelawyer.com

* Washington License WSBA 34593

* Oregon License OSB 03551

April 1, 2008

VIA FAX & MAIL: (503) 961-7854

Mr. Neil Olsen

Little Mendelson

1750 SW Harbor Way, Ste. 450

Portland, OR 97201

Re: Migis v. AutoZone, Inc.

(Mult. Co. Cir. Court No. 0711-13531)

Neil:

To clarify, for Plaintiff's Request For Production No. 5 (employee time records) in the Third Set of discovery requests, the phrase "electronic format" means usable electronic format, not .pdf, as AutoZone retains that information or as can otherwise be extracted using a mainframe database extraction program, such as OnDemand 32.

Please call me to discuss this issue, or if you have any other questions. Thanks.

Sincerely yours,



Chey K. Powelson
Attorney for Plaintiffs

EXHIBIT F
Page 1

***** -COMM. JOURNAL ***** DATE APR-01-20 ***** TIME 14:01 *****

MODE = MEMORY TRANSMISSION

START=APR-01 14:00

END=APR-01 14:01

FILE NO.=848

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	2	15039617854	002/002	00:00:33

-BAILEY PINNEY

***** UF-8000 v2 ***** -3605673331

- *****

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law

1498 SE TECH CENTER PLACE, SUITE 290

VANCOUVER, WA 98683

Telet: 1-800-882-8351

Fax: 360-567-3331

CS

April 1, 2008

PERSONAL AND CONFIDENTIAL

TO: Olsen, Neil

FAX NO. (503) 961-7854

Number of Pages (including cover page): 2

RE: *Migis v. Autzone*

Electronic Format

IF YOU DID NOT RECEIVE ALL PAGES, CONTACT ME IMMEDIATELY AT (360) 567-2551

COMMENTS: ORIGINAL DOCUMENTS

Regular mail

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EXHIBIT F

Page 2

Exhibit G

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

2/4



May 8, 2008

Leigh Ann Tift
Direct: 206.381.4905
Direct Fax: 206.447.6965
ltift@littler.com

VIA MAIL AND FACSIMILE

Chey Powelson
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: *Migis v. AutoZone, Inc.*
Multnomah County Circuit Court Case No. 0711-13531

Dear Mr. Powelson:

This is in response to your most recent letter regarding the second 39C deposition notice and our discovery conference this morning. In your letter of May 2, 2008 regarding the location of the 39C deposition, you state: "Defendant still appears to be under the impression that it must produce one or more ORCP 39C(6) designees who are 'qualified' to testify based upon their personal knowledge [in response to these notices]."

We do not believe that the witnesses need to testify on the basis of personal knowledge. I am well aware that corporate knowledge of a witness will suffice for this purpose. I am also well aware of the requirement that the corporation produce the most qualified person to testify on its behalf. See, *Martel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 798 (9th Cir. 2003); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 17 (1st Cir. 2000) (corporation must identify person who best speaks for it on 30(b)(6) subjects). As I have explained to you numerous times, AutoZone's payroll employees, and specifically the person knowledgeable about the subjects you identify in your deposition notice, all live and work in Memphis. None are resident in the state of Oregon. AutoZone cannot teach its store managers or area managers in Oregon an area entirely outside their job responsibilities and then designate them as a person best able to speak to AutoZone payroll policies and programs and will not do so. The second 39C designee will be available for deposition in Memphis. If you want to take a telephone or video deposition, that is acceptable to us.

You asked about the designee for the first 39C deposition and whether that person will be prepared to speak to all subjects in the notice—you specifically mentioned AutoZone's defense of laches, and your contention that the company must produce a fact witness to show that it was materially harmed by delay. I maintain that most of what you spoke of is legal theory, or application of law to facts, but to the extent that the witness can testify without

THE NATIONAL EMPLOYMENT LAW FIRM

600 University Street, Suite 3200, Seattle, Washington 98101-3122 Tel: 206.623.3300 Fax: 206.447.6965 www.littler.com

EXHIBIT 6

Page 1

P. 002

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

3/4

Chey Powelson
May 8, 2008
Page 2

disclosing attorney client communications or work product, we will produce an appropriate witness next week.

With respect to the lengthy discovery conference this morning, lasting more than 1 1/2 hours, please note that I have offered to look at documents you designate to see if we will stipulate to their authenticity. You indicate you feel you should not have to spend the time identifying these documents, but did, eventually, ask that I review Bates-labeled documents AZ/Migis 282-294 and something you called the "Q-2 earnings report." I've looked at Bates labeled documents AZ/Migis 282-294, and we will stipulate that these documents, and any others that are titled "Employee 200_ [inserting the noted year and quarter] Earnings Record" are what they purport to be—that is, a report of an employee's earnings by quarter. You asked that I also stipulate that "everything like them" is authentic. I'm not able to enter into such a stipulation, but if you want to identify documents, or even Bates-ranges, I will, as I said, look at them and give you our answer.

You asked that AutoZone produce all of Mr. Migis' work schedules. As I think you know, from the previous case, AutoZone managers do not always retain work schedules. A work schedule is a plan—it does not represent the actual hours worked. AutoZone does keep proper records of hours worked, but does not necessarily keep work schedules. I believe you have what there is to produce in regard to Mr. Migis' past work schedules, but if there are schedules that are located as this case progresses, we will produce them. The same is true for any other documents that are located and are responsive to discovery requests.

You asked for an electronic copy of the lunch variance report we sent you in hard copy. I will have a disk sent to you.

You asked me to send a corrected copy of my declaration in support of our opposition to the motion for attorney fees. If I mistakenly attributed a conversation to the wrong day, I will make sure the court is aware of the mistake.

You suggested that AutoZone did not produce all emails relative to your RFP # 2 because, you posit, AutoZone managers "must be emailing" one another "all the time" about wage and hour matters. I told you I'd seen nothing that would lead me to believe that was true. You also seem to forget that this Request does not ask about emails about "wage and hour matters," it is much more specific than that. You asked me if I include all HR managers when I said I had not seen anything that led me to believe your hypothesis was correct, and I responded, and want to reiterate, that we are talking about specific discovery requests, not my personal opinions—or yours—about the content of email traffic within AutoZone.

You suggested that AutoZone had not complied with its obligation to provide Plaintiff with a "weekly summarization of hours" in response to RFP No. 4. AutoZone provided Plaintiff with exactly what was requested.

EXHIBIT 6
Page 2

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

4/4

Chiey Powelson
May 8, 2008
Page 3

We had an extended discussion about Plaintiff's demand for every time record for every employee employed by AutoZone in Oregon for the one year period preceding the filing of the Migis complaint. You initially asked if AutoZone would stipulate to class certification. We will not. Next, you suggested that you would agree to accept 1 out of every 5th employee's records, if I would stipulate that that sample was representative. I asked if you would also stipulate that those records were representative, which you declined to do. You then changed your mind and said you would accept 1 out of every 3rd employee's records if I would stipulate that the records were representative, but again declined to do so on behalf of Plaintiff. Next you said you might consider that stipulation if I would agree you could depose the person who randomly selected the employee's whose records were produced. Ultimately, you changed your mind about that, too, and said you intended to move to compel all time records for all employees.

Finally, I am compelled to address the conclusion of our conversation. I felt that the conversation degenerated into comments that were completely unprofessional and sometimes bizarre (the "metaphysical truth" part, for example). I would appreciate it if you would refrain from this kind of conversation in the future. I think that these discovery conference should be much briefer and more to the point.

Sincerely,



Leigh Ann Tift

cc: Tanya Holmes
Amy Alpern

Firmwide:85145553.1 0133062124

EXHIBIT 6
Page 3

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

1/4



FACSIMILE COVER SHEET

May 8, 2008

To: Chey K. Powelson Fax: 360.567.3331 Phone: 360.567.2551
Bailey, Pinney & Associates, LLC

Fax #(s) verified before sending (initial):

From: Leigh Ann Tift Fax: 206.447.6965 Phone: 206.381.4905

Length, including this cover letter: 4 Pages

If you do not receive all pages, please call Savanna L. Stevens at 206.381.4932.

Message:

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EXHIBIT 6

Page 4

Exhibit H

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* Oregon License OSB 03551

May 9, 2008

VIA E-MAIL ONLY

Ms. Leigh Ann Tift
ltift@littler.com
One Union Square
600 University St, Ste 3200
Seattle, WA 98101-3122

Re: Migis v. AutoZone, Inc. (Multnomah Co. Circuit Court No. 0711-13531)
Follow-up to 05-08-08 Telephonic Discovery Conference

Ms. Tift:

This is to follow up what we discussed yesterday morning in our phone conversation on various discovery issues.

Proposed Stipulation to the Authenticity of Defendant's Own Documents

In regards to the issues in my April 23 letter, you refused to stipulate to Plaintiff propounding additional Requests For Admission to determine the authenticity of all documents Defendant has produced (and which appear to be business records).

You then requested that I give you a list of documents Plaintiff would like Defendant to stipulate to in regards to authenticity. I gave you certain examples, which you identify in your follow up letter of yesterday, and agreed to stipulate to (the "everything like them" I referred to in the conference are in fact those "Employee 200_" documents you identified in your letter).

As for the remaining categories of documents, please stipulate to the authenticity of the following categories of documents:

1. AZ/MIGIS 0000295 - 486 (SMS Time Final Historical Reports)
2. AZ/MIGIS 0000487 - 550 (driving policies)
3. AZ/MIGIS 0000551 (meal period report)
4. AZ/MIGIS 0000552 - 707 (SMS Time Final Historical Reports)

EXHIBIT H

Page 1

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008

2

5. AZ/MIGIS 0000708 - 753 (SMS Time Final Historical Reports)
6. AZ/MIGIS 0000754 - 1211 (security/alarm logs)
7. AZ/MIGIS 0001220 - 1235 (meal period report)
8. AZ/MIGIS 0001236 - 1252 (travel policy)
9. AZ/MIGIS 0001253 - 1288 (meal period report)
10. AZ/MIGIS 0001289 - 1346 (AutoZoner Time Cards)
11. AZ/MIGIS 0001347 (Termination Report); AZ/MIGIS 0001348 - 1457 (Job Data)
12. AZ/MIGIS 0001458 - 1620 (Job/Pay Data)
13. AZ/MIGIS 0001621 - 1655 (AutoZone Store Handbook)
14. AZ/MIGIS 0001656 - 1817 (Paycheck Data)
15. AZ/MIGIS 0001818 - 1881 (Termination Reports)
16. AZ/MIGIS 0001882 - 2037 (*Foundations* manuals/handbooks)
17. AZ/MIGIS 0002038 - 2068 (Being a Manager)
18. AZ/MIGIS 0002069 - 2213 (Being a Manager)
19. AZ/MIGIS 0002214
20. AZ/MIGIS 0002215 (Mark Dessem e-mail)
21. AZ/MIGIS 0000001 - 294 ("Personnel file")

Otherwise, Defendant will not stipulate to Plaintiff propounding Requests For Admission beyond the number the Oregon Rules permit.

Work Schedules and Management Action Plans

Per my April 28 letter (and relating to a Court Order on this matter), I inquired as to whether Defendant will produce additional work schedules relating to Mr. Migis. I referenced Judge Kantor's preservation order in the *Joarnt* case, and surmised that those schedules should have been retained.

EXHIBIT H

Page 2

Ms. Leigh Ann Tift – Migis v. AutoZone, Inc. (Follow-up to 05-08-08 Disc. Conf.)

09 May 2008

3

I also referenced Defendant's non-production of any "Payroll Weekly Hours Summary Reports," which shows a store's employees' names, regular hours worked and paid, and any overtime hours paid. I referenced Joarnt document production as an example: AZPB0001520.

Again, this is information Defendant should have retained pursuant to Judge Kantor's preservation order, and also produced in this case in response to the Court's Order on Plaintiff's Second Set of Requests For Production 5 - 6.

Nonetheless, you represented Defendant had made a diligent search, and although Defendant has complied with the Court's Order referenced above, Defendant will continue to look for responsive documents.

Missed Lunch and Lunch Variance Reports

You committed to producing these reports in Excel format, to the extent AutoZone has it.

Additional Termination Reports in Response to the Second Court Order

Defendant has produced all such reports it has located. I nonetheless indicated that due to the non-production of approximately 96 Termination Reports, Plaintiff in his supplemental briefing to the Court will request additional relief, based on the non-production of this information.

This non-production becomes even more important because: (a) the information exists electronically in the summary report (Bates No. AZ/MIGIS 0001212, *et seq.*), and (b) Defendant represented to the Court that only by producing the Termination Reports would Defendant be able to show that the apparent "late pays" on the summary report were not really late.

Defendant's Declaration Supporting Objection to Plaintiff's Attorneys' Fees

I urged correction of this document, so as to avoid any undue and un-necessary confusion at hearing on this matter. You committed to correcting the declaration if and where appropriate.

Defendant's Responses to Plaintiff's Third Set of RFPs

1. RFP Nos. 1 - 2: You stated that the Mark Dessem e-mail (0002215) is the only one that presumably exists.

I also disagree with your follow up letter of yesterday; during the conference I did not say that managers are e-mailing all the time on wage and hour issues, but are probably e-mailing all the time (I referred to you Bates No. 0002159 re: "Communication"), and such e-mails should include wage and hour issues.

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008

4

It is very unlikely Oregon AutoZone managers have never, for the time period referenced, sent or received any e-mail or memoranda on employee hours, wages and the like in Oregon.

2. **RFP No. 3:** You represented Defendant could not find Daily Coverage Lists (reports) at present. Again, this is concerning in light of Defendant's prior preservation obligations.
3. **RFP No. 4** (all documents and reports reflecting any weekly summarization of hours worked by AutoZone employees): You represented that Defendant has fully complied with this discovery request by producing *one* report in Excel format. I strongly disagreed because the Request seeks "all documents and reports," not one report.

I further requested that Defendant produce more relevant documents such as the "Payroll Weekly Hours Summary Report," and referenced the *Joarnt* document production by way of example: AZPB0001520, 1463, and 0000812.

5. **RFP No. 5:** I asked you to stipulate to class certification if AutoZone is refusing to produce one year's worth of time records. You refused and stated that we have Plaintiff's own time records. I therefore requested that Defendant stipulate to Plaintiff's records as representative of the entire class, and that he is an adequate class representative (including having suffered common and typical claims).

You refused that offer as well, at which point I again requested the time records. In an effort to brainstorm to an amicable solution, I proposed production of a random selection of, for example, one out of four or five, provided Defendant would stipulate that such time records would be representative of the one year's worth. You said no.

I stated that if you could not stipulate then Plaintiff would have to compel the entire year's worth of records. You then asked me if I would stipulate to the time records being representative; I was unsure whether I could do that because Defendant, not Plaintiff, is in the best position to know whether those records are truly representative.

I also asked that if I did stipulate, would Defendant not use that to somehow oppose numerosity or the like. You could not agree to that, so I proposed one out of every three people, provided that Defendant allow Plaintiff to depose the IT person who compiles that those time records.

I then agreed to send you a proposal in writing, but in your follow up letter you are under the impression that I would not send a proposal. Therefore, please consider the proposal withdrawn; Plaintiff will move to compel.

6. **RFP Nos. 6 - 8:** You represented Defendant has produced everything thus far located, but will produce additional documents to the extent they are found.

EXHIBIT H
Page 4

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008

5

You further stated that you didn't find that AutoZone managers e-mail each other about wage and hour issues. Rather, you represented that Defendant "communicates" via policies, handbooks and training.

I further referred you to *Joarnt* document production as an example of other documents that Defendant should have produced: AZ 1010, 1012.

7. **RFP No. 9:** We could not agree as to this issue; I reiterated the reasoning in my May 1 letter.
8. **RFP No. 10:** I asked whether you had the opportunity to read the *AutoZone, Inc. v. Ferrell Air Conditioning & Heating*, case, but you had not. You represented that discovery is ongoing.
9. **RFP Nos. 11 - 13:** We were not able to make any headway on issues related to these Requests.

Finally, in regards to your comments on the conference degenerating into unprofessional matters such as my reference to "metaphysical truth," you seemed rather interested in that topic, which I initially mentioned only in passing on the rhetorical question of whether a stipulation actually makes something true.

In the future and for your convenience I will refrain making any references that could be construed as humor. You are correct to imply that this is a serious matter.

For my convenience and in the spirit of professionalism, however, I would ask you refrain from injecting an undue number of sarcastic comments into the conversation (e.g., asking me if I need help spelling), as it does not contribute positively to the issues at hand.

Overall, however, though we disagree on many matters, I think you'll agree it could be worse.

Thank you for your patience, and I look forward to further conferences with you.

Sincerely,

/s/

Chey K. Powelson
Attorney for Plaintiff

EXHIBIT H
Page 5

Chey Powelson

From: Chey Powelson
Sent: Friday, May 09, 2008 3:08 PM
To: 'Tift, Leigh Ann C.'
Cc: Bud Bailey; Brad Griffin; Charity Shindle; Alpern, Amy R.
Subject: Migis v. AutoZone -- Follow up to 05-08-08 Disc. Conf.
Follow Up Flag: Follow up
Flag Status: Red
Attachments: To Defendant_Follow Up Disc Conf_05-09-2008.pdf

Ms. Tift:

See attached letter. Thanks.

Chey K. Powelson

Attorney at Law
Bailey, Pinney & Assoc., LLC
1498 SE Tech Center Pl, Ste 290
Vancouver, WA 98683
Cpowelson@wagelawyer.com
360.567.2551 (Ph)
360.567.3331 (Fax)

Confidentiality Notice: This e-mail message may contain confidential and privileged information. If you have received this message by mistake, please notify me immediately via telephone, and do not review, disclose, copy, or otherwise distribute it. Thank you.

5/23/2008

EXHIBIT H
Page 4

Exhibit I

Deposition of MARK DESSEM, taken on . 1st 25, 2005

Page 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT AND BERT YAMAOKO,
individually, and on behalf of all
others similarly situated
VS.
AUTOZONE, INC., a Foreign Corporation

PLAINTIFFS
NO. 0503-02795
DEFENDANT

DEPOSITION OF MARK DESSEM

TAKEN AT THE INSTANCE OF THE PLAINTIFFS
IN THE OFFICES OF THE SHELBY COUNTY COURTHOUSE
40 ADAMS AVE. RM 228, MEMPHIS, TENNESSEE
ON AUGUST 25, 2005, BEGINNING AT 8:55 A.M.

(APPEARANCES NOTED HEREIN)

Reported by: REGINA D. RUSSELL, CSR 1110

ADVANCED COURT REPORTING
P.O. BOX 761
TUPELO, MS 38802-0761
(662) 690-1500

Deposition of MARK DESSEM, taken on . 1st 25, 2005

Page 2

1 APPEARANCES:

2 For the Plaintiffs: A. E. BUD BAILEY, ESQUIRE
Bailey, Pinney & Associates, LLC
3 Columbia Tech Center
1498 SE Tech Center Place
4 Suite 290
Vancouver, Washington 98683
5 (360) 567-2551
6

For the Defendant: LEIGH ANN COLLINGS TIFT, ESQUIRE
7 Littler Mendelson
701 Fifth Avenue, Suite 6500
8 Seattle, Washington 98104-7097
(206) 623-3300
9

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Deposition of MARK DESSEM, taken on August 25, 2005

Page 61

1 in and manipulate that.

2 Q. So this report that we've seen in Exhibit 1
3 and Exhibit 3, is that the payroll register?

4 A. No. No. This is a time card.

5 Q. These are just time card reports?

6 A. Yes.

7 Q. Okay. When you do a payroll register then,
8 your record then is a 48,000 employee record. Is it
9 an alpha record? I mean, is it all by -- first of
10 all, is it a 48,000 employee record?

11 A. No.

12 Q. Is it set up that way?

13 A. Well, ultimately on the entire report,
14 everybody is going to appear. But it is first, I
15 believe, broken down by what we call pay group, which
16 is going to separate people into different pay
17 groups. And then within pay group, it would be
18 broken down, I believe, by store.

19 Q. Okay. So if you had the store numbers for
20 each geographic area by state, would it be possible
21 to manipulate that record to be able to just provide
22 all the individuals that were working in Oregon, for
23 example, for a given period of time, whether it be
24 one pay period or for several pay periods?

25 A. Yes. It could be done. It would be

Deposition of MARK DESSEM, taken on . . . ust 25, 2005

Page 62

1 cumbersome to do it, because you'd have to go in and
2 work your way around and basically do screen prints
3 and that sort of thing. But you could probably get
4 to where you were --

5 Q. Do you know whether or not there is a
6 separate data system that's used to maintain
7 personnel information that, on a particular snapshot
8 day, that -- for example, a list of all the employees
9 that work in a particular geographic area, such as
10 Oregon, could be identified and printed out all at
11 once?

12 A. Again, if you're -- ask that again? On a
13 given day? Who worked on a given day?

14 Q. Yes. Or, even more specific, if we have a
15 period from a date back so many years, we want to
16 know all the names of the people who worked in
17 Oregon, is there a payroll or personnel record that's
18 kept by computer that stores that information that
19 could be downloaded and printed?

20 A. Outside of the payroll register, it would
21 be difficult. I'm not saying it can or can't be
22 done. Again, that's more of an IT thing, because
23 you're trying to go into the system and pull data
24 out. And if I'm understanding you, you're saying,
25 hey, I want to see all the people that worked in

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT AND BERT YMAOKO,
individually, and on behalf of all
others similarly situated PLAINTIFFS

VS. NO. 0503-02795

AUTOZONE, INC., a Foreign Corporation DEFENDANT

DEPOSITION OF MARK DESSEM

TAKEN AT THE INSTANCE OF THE PLAINTIFFS
IN THE OFFICES OF THE SHELBY COUNTY COURTHOUSE
40 ADAMS AVE. RM 228, MEMPHIS, TENNESSEE
ON AUGUST 25, 2005, BEGINNING AT 8:55 A.M.

(APPEARANCES NOTED HEREIN)

Reported by: REGINA D. RUSSELL, CSR 1110

ADVANCED COURT REPORTING
P.O. BOX 761
TUPELO, MS 38802-0761
(662) 690-1500

ORIGINAL

C E R T I F I C A T E

STATE OF MISSISSIPPI)

COUNTY OF LEE)

RE: ORAL DEPOSITION OF MARK DESSEM

I, Regina D. Russell, CSR 1110, a Notary Public within and for the aforesaid county and state, duly commissioned and acting, hereby certify that the foregoing proceedings were taken before me at the time and place set forth above; that the statements were written by me in machine shorthand; that the statements were thereafter transcribed by me, or under my direct supervision, by means of computer-aided transcription, constituting a true and correct transcription of the proceedings; and that the witness was by me duly sworn to testify to the truth and nothing but the truth in this cause.

I further certify that I am not a relative or employee of any of the parties, or of counsel, nor am I financially or otherwise interested in the outcome of this action.

Witness my hand and seal on this 1st day of September, 2005.

My Commission Expires: CSR 1110
May 27, 2008 Notary Public

Exhibit J

AutoZoner Time Card

*** AutoZone 2236 ***

11/19/2005

21:17:06

Page 1

AutoZoner Name: MIGIS, MICHAEL

AutoZoner ID: 10090549

Day Of Week	Date	Daily Hours	Clock In	Clock Out	Change Reason
Sunday	11/13/2005	7:03	11:12	15:42	
			16:53	19:26	
Monday	11/14/2005	0:01	19:27	19:27	
Tuesday	11/15/2005	-			
Wednesday	11/16/2005	5:56	7:39	13:35	
Thursday	11/17/2005	7:37	12:41	17:06	
			18:10	21:22	
Friday	11/18/2005	8:38	7:37	12:48	
			14:02	17:29	
Saturday	11/19/2005	7:08	12:58	16:20	
			17:30	21:16	
Total Hours		36:23			

AutoZoner Signature: _____

Management Signature: _____

Store Copy

EXHIBIT

J

AZ/MIGIS 0001333

Page

1

Exhibit K

AutoZoner Time Card

*** AutoZone 2236 ***

09/03/2005

21:44:52

Page 1

AutoZoner Name: MIGIS, MICHAEL

AutoZoner ID: 10090549

Day Of Week	Date	Daily Hours	Clock In	Clock Out	Change Reason
Sunday	08/28/2005	7:41	22:18	9:41	-11:23 AutoZoner Failed To Clock Out
			10:57	16:12	
			17:06	19:30	
Monday	08/29/2005	-			
Tuesday	08/30/2005	-			
Wednesday	08/31/2005	8:10	12:41	16:58	
			17:48	21:41	
Thursday	09/01/2005	7:52	21:42	21:44	
			13:06	16:47	
			17:46	21:10	
			21:10	21:56	
Friday	09/02/2005	9:46	7:37	17:23	
Saturday	09/03/2005	7:48	12:55	16:56	
			17:56	21:43	
Total Hours		41:17			

AutoZoner Signature: _____

Management Signature: _____

Store Copy

EXHIBIT K
Page 1

AZ/MIGIS 0001323

Exhibit L



FILED
06 MAR 27 AM 11:23
CLERK OF COURT
FOR MULTNOMAH COUNTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT and BERT
YAMAOKO, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

No. 0503-02795

**ORDER ON PLAINTIFFS' MOTIONS
FOR ORDER REQUIRING
DEFENDANT TO PRESERVE
EVIDENCE AND FOR PROTECTIVE
ORDER, AND ON DEFENDANT'S
MOTION TO ENJOIN PLAINTIFFS
FROM CONTACTING
REPRESENTED PARTIES AND
MOTION FOR PROTECTIVE
ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS
MEMBERS**

THIS MATTER, having come before the Court upon Plaintiffs' and Defendant's above-referenced Motions, and the Court having reviewed the file, and being fully advised of the premise thereof during hearing of these Motions on January 27, 2006; the Court hereby **ORDERS** that:

1. Defendant's Motion to Enjoin Plaintiffs from Contacting Represented Parties and Motion for Protective Order Limiting Plaintiffs' Contact with Putative Class Members, is **DENIED**. Plaintiffs are allowed to conduct investigation and contact AutoZone employees and store managers as part of such investigation; **PROVIDED**, however, that such contact include a disclosure that the investigation is related to the employee's experience as an hourly employee. **MOREOVER**, Plaintiffs are not entitled to directly contact current district managers or other current employees occupying positions of authority above the district manager level, regarding this case without permission of Defendant and/or the Court except to

Page 1 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS MEMBERS

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

EXHIBIT L
Page 1-3

1 determine if the person is a district manager or other person with whom contact is restricted.
 2 Defendant shall provide Plaintiffs with a list of such individuals whom Defendant believes
 3 Plaintiffs are not entitled to contact, PROVIDED, HOWEVER, that Defendant's duty to
 4 provide this information is STAYED in accordance with Paragraph 4 of this Order.

5 2. In regards to Plaintiffs' Motion for Order Requiring Defendant to Preserve
 6 Evidence and Motion for Protective Order:

7 a. Plaintiffs' Motion for Protective Order (restricting Defendant's
 8 communications with putative class members) is **DENIED**. Defendant may conduct
 9 investigation to prosecute and defend their claims and defenses; PROVIDED, however,
 10 Defendant does not try to persuade any putative class members to not participate in the class.

11 b. Plaintiffs' Motion for Order Requiring Defendant to Preserve Evidence
 12 is hereby **GRANTED** to the extent that Defendant will preserve all contents of currently-
 13 existing (from November 2004 and later) Oregon AutoZone store "period boxes," or any
 14 future boxes that are created and maintained during the course of this lawsuit, for all
 15 AutoZone stores in the State of Oregon. FURTHERMORE, Defendant will arrange for the
 16 storage of those boxes and their contents in such a way that provides Plaintiffs reasonable
 17 access to review and copy the contents of those boxes. Plaintiffs are not entitled to documents
 18 containing confidential information that is entirely unrelated to the claims or defenses in this
 19 lawsuit. If the parties disagree over the discoverability of one or more documents contained
 20 in any of the period boxes, Plaintiffs are entitled to copy that document or documents and
 21 move the Court for a ruling as to the disputed document or documents' discoverability.

22 3. All requests for costs and attorneys fees and/or sanctions as made in the above-
 23 referenced Motions are **DENIED**.

24 ///

25 ///

26 ///

Page 2 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
 AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
 CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
 CONTACT WITH PUTATIVE CLASS MEMBERS

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EXHIBIT L

Page 2-3


THE HONORABLE HENRY KANTOR
MULTNOMAH CO. CIRCUIT COURT JUDGE

SHAUNA M. SJOSTROM, OSB 04418
Of Attorney for Plaintiffs

EXHIBIT C
Page 3-3

Page 3 -

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6 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
7 **FOR THE COUNTY OF MULTNOMAH**
8

9 **MICHAEL MIGIS**, individually, and on
10 behalf of all others similarly situated,

11 Plaintiff,

12 v.

13 **AUTOZONE, INC.**,

14 Defendant.
15

Case No. 0711-13531

**PLAINTIFF'S SECOND MOTION
FOR ORDER COMPELLING
DISCOVERY**

Date: **June 30, 2008**

Time: 9:00 a.m.

Court: The Hon. Jerome LaBarre

Rm: 702

16
17 **REQUEST FOR ORAL ARGUMENT:** Pursuant to UTCR 5.050, Plaintiff estimates
18 the time needed for oral argument to be 15 minutes. Court reporter services are not required.

19 **UTCER 5.010 CERTIFICATION OF COMPLIANCE:** Plaintiff's counsel certifies he
20 made good faith efforts to confer and did confer with opposing counsel to resolve the issues in
21 this *Motion*, but the parties are unable to reach resolution. See *Declaration of Chey K. Powelson*
22 (*"Powelson Decl."*), ¶ 2.

23 **I. MOTION**

24 **PLAINTIFF MICHAEL MIGIS**, through his attorneys, moves this Court for an order
25 compelling Defendant AutoZone to, within ten (10) calendar days of hearing on this matter,
26

1 produce the following:

- 2 1. One year of electronic time records for all hourly Oregon AutoZone employees
- 3 2. All documents and reports reflecting weekly summarization of hours worked by
- 4 Plaintiff Migis, including the "Payroll Weekly Hours Summary Report."

6 II. ARGUMENT & AUTHORITIES

7 A. Overview

8 "[I]f a party in response to a request for inspection submitted under Rule 43 fails to permit
9 inspection as requested, the discovering party may move for an order compelling discovery in
10 accordance with the request." ORCP 46A(2). "[A]n evasive or incomplete answer is to be treated
11 as a failure to answer. ORCP 46A(3).

12 1. Plaintiff's Third Set of Requests For Production

13 Defendant responded to Plaintiff's Third Set of Discovery Requests on or about May 5,
14 2008. *Powelson Decl.*, Ex. A. Defendant's document production was lacking, however, and
15 despite two discovery conferences on the matter, Defendant did not produce additional
16 documents. *Id.*, ¶ 2.

17 2. April 2, 2008 Court Order

18 The Court's Order on Plaintiff's *First Motion for Order Compelling Discovery* required
19 AutoZone to produce:

20 *[A]ll documents and reports reflecting any weekly summarization of hours worked by*
21 *Plaintiff, whether individually or by inclusion in a larger group, for the period of time*
from three (3) years prior to the filing of the Complaint, up to present.

22 See *Powelson Decl.*, Exs. B (Order) and C ((Plaintiff's Second Set RFP No. 6) (italics added).

23 During discovery conferences on this issue, Plaintiff referred Defendant's counsel to
24 *Joarnt v. AutoZone* documents, including a "Payroll Weekly Hours Summary Report." *Powelson*
25 *Decl.*, Exs. D - E. Unfortunately, the parties made no substantial progress, and Defendant did not
26

1 produce any Reports.

2 Due to the time-lines at issue in this case, Plaintiff must move to compel. If however,
3 Defendant finds and produces additional responsive documents prior to hearing, the parties will
4 inform the Court of that production.

5
6 **B. Hourly AutoZone (Individual) Employee Time Electronic Records (RFP No. 5,**
7 **Third Set)**

8 Plaintiff's Request For Production No. 5 reads as follows:

9 Produce in electronic format all time sheets reflecting the hours each Oregon
10 hourly employee worked for Defendant, including but not limited to, all time
11 records, time cards, punch clock records, time sheets, work time schedules, for
12 the period of time from one (1) year prior to the filing of the Complaint,
13 through the date of that filing.

14 During the March 7, 2008 hearing on Plaintiff's first motion to compel, with assistance
15 from the Court and discussion on the record, the Court ordered allowed production of other,
16 certain pre-class certification for a one year time period. See *Powelson Decl.*, Ex. B (Order).

17 For purposes of further pursuing pre-class certification discovery, Plaintiff subsequently
18 propounded Request for Production No. 5, limited to one year. Plaintiff also sent Defendant's
19 counsel a follow-up letter clarifying that Plaintiff seeks these time records not in .pdf format, but
20 in "useable electronic format." *Powelson Decl.*, Ex. F.

21 In an effort to find some middle ground, during a subsequent discovery conference on
22 Request For Production No. 5, Plaintiff's counsel first asked Defendant's counsel Leigh Ann Tift
23 to stipulate to class certification. Ms. Tift declined. Plaintiff's counsel then asked Defendant
24 stipulate that Mr. Migis is an adequate class representative. *Powelson Decl.*, ¶ 6, and Ex. H. This
25 could have conceivably alleviated the need for production of other employees' time records, and
26

1 would also necessarily affect consideration of the “commonality” and “typicality” ORCP 32A
2 factors.

3 Defendant would not stipulate. So Plaintiff again requested the one year’s worth of time
4 records. Defendant’s counsel declined. Nonetheless, in another effort to compromise, Plaintiff’s
5 counsel proposed a representative sampling of time records out of the one year timeframe.
6 *Powelson Decl.*, ¶ 6.

7 However, when Plaintiff asked Defendant’s counsel to agree that AutoZone would *not*
8 leverage the sampling of records to somehow argue there was no numerosity, Defendant’s
9 counsel declined. *Powelson Decl.*, ¶ 6.

10 Plaintiff also requested that Defendant stipulate that time records for one out of every
11 three employees over the course of one year would be representative of at least the entire year.
12 Defendant’s counsel would not stipulate unless Plaintiff’s counsel stipulated “first.” *Powelson*
13 *Decl.*, ¶ 7. Unfortunately, a short time later during that same phone conference Defendant’s
14 counsel Tift accused Plaintiff of never intending to any stipulation, and then sent Plaintiff a letter
15 to that same effect. *Id.*, ¶ 7, Exs. G - H.

16 During the parties’ final discovery conference on this matter, although AutoZone offered
17 to produce time records for one in three Oregon hourly employees over one year, Plaintiff again
18 requested one year’s worth of records for all employees, either (a) for one calendar year, or (b)
19 from four months for each of three years. Defendant would not produce time records for that
20 length of time. *Powelson Decl.*, ¶ 8. AutoZone is apparently refusing to produce an entire year’s
21 worth on the grounds that such production would be unduly burdensome.

22 However, production of an entire year is not unduly burdensome for AutoZone for two
23 reasons. First, Defendant did not object to Request No. 5 on the grounds that it was unduly
24 burdensome. See *Powelson Decl.*, Ex. A (Defendant only objecting that the Request was “vague,
25 overbroad and irrelevant, and exceed[s] the proper scope of pre-class certification discovery.”).
26

1 Second, in the *Joarnt v. AutoZone* case, AutoZone's Director of Payroll did not testify that
2 the process of gathering electronic time records for all Oregon AutoZone employees would be
3 unduly burdensome; rather he testified that the process would merely be cumbersome. *Powelson*
4 *Decl.*, Ex. I (Dessem Dep., 61:25 - 62:4).

5 The requested time records for all Oregon hourly employees are relevant to this putative
6 class action to show: a pattern and practice of AutoZone's conduct (ORCP 32A, 32B:
7 commonality, typicality, pre-domination of common issues), and to defend against Defendant's
8 anticipated argument that Mr. Migis is not an adequate class representative because: (a) the harm
9 he suffered is not common or typical of the class, and (b) he has no personal knowledge of how
10 AutoZone treated other hourly employees in other stores where Mr. Migis did not work.¹

11 The time records are also clearly important for the Court to determine whether this suit
12 is properly maintainable as a class action. Oregon Rule of Civil Procedure 32C mandates a court
13 "shall determine by order whether and with respect to what claims or issues [the suit] is to be so
14 maintained and shall find the facts specially and state separately its conclusions thereon."

15 In sum, the information Plaintiffs seeks in Request for Production No. 5: (1) does not
16 create an undue burden on Defendant; and (2) is relevant and important for the Court to determine
17 whether this suit can be maintained as a class action.

18 The Court should therefore compel AutoZone to produce its Oregon employees' time
19 records in useable electronic format dating back from one year prior to the filing of the
20 Complaint. Time is also of the essence due to the August 15, 2008 filing deadline for Plaintiff's
21 Motion for Class Certification Motion, as set forth in the Case Management Order.

22 ///

23 ///

24 _____
25 ¹An entire year of records for all hourly employees will also make it easier to determine
26 the turnover rate, which can used to show numerosity and better determine the size of various
classes.

C. First Court Order That Defendant Produce All Documents and Reports Reflecting Any Weekly Summarization of Hours Worked by Plaintiff Migis (April 2, 2008 Court Order, ¶ 4(f)).

While in response to the Court Order Defendant produced many but not all of Plaintiff Migis's weekly "AutoZoner Time Cards"² for the time he worked in several different Oregon AutoZone stores, AutoZone did not produce any other types of documents and reports showing additional information about Mr. Migis's "hours worked."

For example, the "AutoZoner Time Card" shows only generally a week's worth of daily hours, clock in and clock out times, and any reasons for a change to those clock in and out times. However, the "Payroll Weekly Hours Summary Report" shows an employee's weekly regular hours, hours paid, and *total overtime*. *Powelson Decl.*, Exs. D - E. In addition, any hard copy documents produced and relating to Mr. Migis may have handwritten notes such as those produced in the *Joarnt* case. See *id.*

The documents therefore appear to be different enough to justify production, especially in light of the Court's Order that Defendant produce all, not just some, documents and reports.

Moreover, in response to preservation of evidence concerns raised by Plaintiffs in the *Joarnt v. AutoZone* case, after hearing in late January 2006 Judge Kantor ordered that AutoZone:

[W]ill preserve all contents of currently-existing (from November 2004 and later) Oregon AutoZone store "period boxes," or any future boxes that are created and maintained during the course of this lawsuit, for all AutoZone stores in the State of Oregon.

Powelson Decl., Ex. L (p. 2, ¶ 2. b.). A "period box" contains one month's worth of an AutoZone store's records.

///

² See e.g., *Powelson Decl.*, Exs. J - K (AutoZoner Time Cards).

1 Although Plaintiff Migis worked for AutoZone from approximately May 2002 to early
2 February 2006, it does not appear that AutoZone has produced all types of documents that exist
3 (or should exist pursuant to the Preservation Order) and would show various aspects of the hours
4 that Plaintiff Migis worked.

5 During the parties' discovery conference on this issue, Plaintiff referred Defendant to
6 different types of documents AutoZone was forced to produce (or allow inspection of) in the
7 *Joarnt* case. Among those types of documents found was the Payroll Weekly Hours Summary
8 Report.

9 That type of document was kept, at least at those stores where they were found, in period
10 boxes. Therefore, in light of Judge Kantor's Preservation Order and the length of Plaintiff
11 Migis's employment with AutoZone in Oregon, it necessarily follows that in this case AutoZone
12 should have produced *all types of documents* in response to the April 2, 2008 Court Order on
13 Plaintiff's Second Set Request For Production No. 2.

14 Additional, hard copy documents—as well as that same information in readable electronic
15 information—relating to Mr. Migis should exist. Plaintiff respectfully requests production of that
16 information as this Court already ordered.

17 **III. CONCLUSION**

18 Plaintiff respectfully requests the Court grant all relief requested herein because the
19 information is relevant to the subject matters in this lawsuit and important for pre-class
20 certification.

21
22 DATED this 23rd day of May 2008.

BAILEY, PINNEY & ASSOCIATES, LLC

23
24 
25 A.E. "BUD" BAILEY, OSB 87157
26 CHEY POWELSON, OSB 03551
Attorneys for Plaintiffs

**Declaration of Chey K. Powelson
Plaintiff's Second Motion to Compel
Discovery**

1
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6 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
7 **FOR THE COUNTY OF MULTNOMAH**

8
9 **MICHAEL MIGIS, et al.,**

Case No. 0711-13531

10 Plaintiff,

11 v.

**DECLARATION OF CHEY K.
POWELSON SUPPORTING
PLAINTIFF'S SECOND MOTION
FOR ORDER COMPELLING
DISCOVERY**

12 **AUTOZONE, INC.,**

13
14 Defendant.
15
16

17 I, Chey K. Powelson, hereby declare as follows:

- 18 1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter,
19 and base the contents of this declaration on my own personal knowledge and/or the
20 litigation files and documents my firm maintains for this litigation.
- 21 2. On or about May 8, 2008, I conferred via telephone with Defendant's counsel Leigh
22 Ann Tift on various discovery issues, including several relating to Defendant's
23 responses to Plaintiff's Third Set of Requests For Production. Attached hereto as
24 **Exhibit A** is a true and correct copy of portions of those responses. On or about May
25 21, 2008, I again conferred with Defendant's counsel Ms. Amy Alpern and Leigh
26

Page 1 -

**DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
ORDER COMPELLING DISCOVERY**

1 Ann Tift on various issues relating to Defendant's responses to Plaintiff's Third Set
2 of Requests For Production. The outcome of both conferences did not result in
3 complete resolution of several discovery issues, including those set forth in Plaintiff's
4 *Second Motion for Order Compelling Discovery*. The parties made no substantial
5 progress, and Defendant did not produce any Reports as they relate to Mr. Migis.

6 3. Attached hereto as **Exhibit B** is a true and correct copy of the Court's Order on
7 Plaintiff's First Motion for an Order Compelling Discovery, for which the Court
8 ordered Defendant to produce "all documents responsive to the Requests," including
9 Plaintiff's Second Set of Requests For Production No. 6. Attached hereto as **Exhibit**
10 **C** is a true and correct copy of an excerpt of Defendant's responses to Plaintiff's
11 Second Set of Requests For Production, including Request No. 6.

12 4. Attached hereto as **Exhibits D and E** are true and correct copies of two "Payroll
13 Weekly Hours Summary Report[s]" Defendant produced in the *Joarnt v. AutoZone*
14 matter. These reports were kept in AutoZone period boxes, as indicated by the prefix
15 to the Bates numbers. These reports are a matter of public record, filed in the *Joarnt*
16 case.

17 5. Attached hereto as **Exhibit F** is a true and correct copy of my April 1, 2008 faxed
18 letter to Defendant's counsel Neil Olsen, in which I reiterated that for Plaintiff's
19 Third Set of Requests For Production No. 5 (employee time records), Plaintiff was
20 requesting that information in useable electronic format.

21 6. Attached hereto as **Exhibit G** is a true and correct copy of Defendant counsel Tift's
22 May 8, 2008 follow-up letter to me, in regards to our discovery conference that day,
23 and during which Ms. Tift accused me of never intending to consider one out of three
24 employee time records for the time period Plaintiff requested in Request for
25 Production No. 5 (Third Set). I did ask Ms. Tift during that conference whether
26

Page 2 -

**DECLARATION OF CHEYK. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
ORDER COMPELLING DISCOVERY**

1 Defendant would stipulate to class certification, or that Mr. Migis is an adequate
2 class representative; she declined to both requests. I then again asked her to produce
3 one year's worth of time records as requested in RFP No. 5. She declined. In
4 another effort to compromise, proposed a representative sampling of time records out
5 of the one year time-frame. During that discussion I asked Defendant's counsel Tift
6 to agree that AutoZone would *not* leverage the sampling of records to somehow
7 argue there was no numerosity, but Defendant's counsel declined.

8 7. Also during the May 8 discovery conference with Ms. Tift I requested whether
9 Defendant would stipulate that time records for one out of every three employees
10 over the course of one year would be representative of at least the entire year.
11 Defendant's counsel would not stipulate unless I stipulated "first." Unfortunately,
12 a short time later during that same phone conference, there was a breakdown in
13 communication resulting in Defendant's counsel Tift accusing me of never intending
14 to accept anything less than one year's worth of time records. See Exhibit G (Tift
15 letter to Plaintiff). Attached hereto as Exhibit H is my May 9, 2008 follow-up letter
16 to the May 8 discovery conference, and e-mail by which I sent that letter as an
17 attachment.

18 8. During the parties' final discovery conference on this matter on May 21, 2008,
19 although AutoZone's counsel offered to produce time records for one in three Oregon
20 hourly employees over one year, Plaintiff again requested one year's worth of records
21 for all employees, either (a) for one calendar year, or (b) from four months for each
22 of three years. Defendant would not produce time records for that length of time.

23 9. Attached hereto as Exhibit I is a true and correct copy of excerpts from the August
24 25, 2006 deposition of AutoZone Director of Payroll Mark Dessem, in which he
25 testified as to the process of compiling Oregon hourly employee time records (or
26

Page 3 -

**DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR
ORDER COMPELLING DISCOVERY**

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

reports).

10. Attached hereto as **Exhibits J and K** are true and correct copies of Plaintiff Migis's "AutoZoner Time Card[s]," which show only generally the date of each clock in and out time, total daily hours, total weekly hours, and any reason for a change to the time record. It does not appear to show discrete "overtime hours" worked, as opposed to **Exhibits D and E**, above.

11. Attached hereto as **Exhibit L** is a true and correct copy of Judge Henry Kantor's *Order on Plaintiffs' Motions For Order Requiring Defendant to Preserve Evidence* and other motions, issued in the *Joarnt v. AutoZone* case (Mult. Co. Case No. 0503-02795) and directing AutoZone to preserve all period boxes from November 2004 and on an ongoing basis.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated this 23rd day of May 2008 at Vancouver, Washington.


CHEY POWELSON, OSB 03551
Attorney for Plaintiff

Page 4-

DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF'S SECOND MOTION FOR ORDER COMPELLING DISCOVERY

Exhibit A

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, *et al.*

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

(Filed as a Class Action)

DEFENDANT'S RESPONSES TO
PLAINTIFF'S THIRD SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS

TO: Defendant AutoZone, Inc., c/o your attorneys Douglas Parker and Neil Olsen, 1750 SW Harbor Way, Ste 450, Portland OR 97201

Plaintiff hereby requests that Defendant make the following documents, as requested in Exhibit "A," available for inspection and copying at the time, date and place set forth below:

TIME, DATE AND PLACE FOR PRODUCTION

TIME: 5:00 p.m.

DATE: April 25, 2008

PLACE: Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Ste 290
Vancouver, WA 98683

///

///

EXHIBIT A
Page 1

DEFINITIONS

a. The term "document" or "documents" as used herein is to be construed broadly and shall mean any kind of hard copy and/or electronic written, recorded or graphic matter in any form of physical media, however produced or reproduced, of any kind of description, whether sent or received or neither, including originals, non-identical copies (whether different from the original because of marginal notes, or other material inserted therein or attached thereto, or otherwise), drafts and both sides thereof, including, but not limited to: agreements, communications, correspondence, telegrams, cables, telex messages, electronic mail messages ("e-mail"), memoranda, records, books, summaries of records or personal conversations or interviews, desk calendars, appointment books, diaries, journals, forecasts, statistical statements, tabulations, accountants' work papers, graphs, charts, accounts, analytical records, affidavits, minutes, records or summaries of meetings or conferences, reports or summaries of interviews or telephone conversations, reports or summaries of investigations, opinions or reports of consultants, appraisals, records, reports or trade letters, press releases, contracts, notes, projections, drafts of any documents, working papers, checks (front and back), check stubs or receipts, sound recordings, data processing records, microfilm, photographs, maps, financial statements or reports thereof, promissory notes, loan agreements, loan files and all notes contained with loan files, revolving credit agreements, deeds of trust, guaranty agreements or indemnification agreements, real estate contracts for sale or lease, pleadings, or any other documents or writings of whatever description, including any information contained in any computer (even if not previously printed out) within the custody or control of you or any of your employees, agents, including attorneys, accountants, investment bankers or advisors, or any other person acting or purporting to act on your behalf.

1 b. Produce all non-identical copies of all responsive documents including copies that
2 bear marks, notations or changes not present on the original.

3 c. If any documents are withheld on grounds of attorney/client privilege or attorney
4 work product immunity, identify the author, each recipient thereof, the nature of the document and
5 the basis upon which the privilege is asserted.

6 d. If any document requested was, but no longer is in the possession, custody, or
7 control of Defendant, or in existence, state whether it (a) is missing or lost, (b) has been
8 destroyed, (c) has been transferred, voluntarily or involuntarily, to others, or (d) has been otherwise
9 disposed of. For each such instance, explain the circumstances surrounding such disposition, give
10 the date or approximate date thereof, and the names and last known home and business addresses of
11 these persons with knowledge of such circumstances.

12 e. "Defendant" as used herein refers to all parties named in this action, and all agents,
13 employees or other persons with an interest in any party.

14 f. These Requests For Production are continuing and, in the event you discover further
15 information that is responsive to them, you must supplement your responses. If you fail to
16 supplement your responses in a reasonable fashion, requestor will move the Court for an order
17 excluding from evidence at trial any matter which is responsive and not furnished.

18 g. The phrase "Electronic Data" includes information from Defendant's computer
19 systems, removable electronic media and other locations. This further includes, but is not limited to,
20 all documents, text files, e-mail and other electronic communication (including logs of e-mail history
21 and usage, header information and "deleted" files), word processing documents, spreadsheets,
22 databases, calendars, telephone logs, fax logs, alarm or security logs or records, video security or
23
24
25
26

1 earlier Requests for Production, notable AZ/Migis 0001621-1655.
2
3

4 **REQUEST FOR PRODUCTION NO. 3:** Produce any and all Daily Coverage Lists for (or used in
5 or by) all Oregon AutoZone stores, for the period of time from two (2) years prior to the filing of the
6 Complaint, through the date of that filing.
7

8 **RESPONSE:** These documents are not retained for the period requested.
9

10
11 **REQUEST FOR PRODUCTION NO. 4:** Produce all documents and reports reflecting any weekly
12 summarization of hours worked by AutoZone hourly employees in stores located in the State of
13 Oregon, for the period of time from two (2) years prior to the filing of the Complaint, through the
14 date of that filing.
15

16 **RESPONSE:** See, attached disk, identified as AZ/Migis 0002214.
17
18

19 **REQUEST FOR PRODUCTION NO. 5:** Produce in electronic format all time sheets reflecting
20 the hours each Oregon hourly employee worked for Defendant, including but not limited to, all time
21 records, time cards, punch clock records, time sheets, work time schedules, for the period of time
22 from one (1) year prior to the filing of the Complaint, through the date of that filing.
23

24 **RESPONSE:** Objection. This Request is vague, overbroad and irrelevant, and exceed the
25 proper scope of pre-certification discovery. Defendant will produce the records should a class be
26

1 certified.

2
3 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents that are, or that reference
4 Defendant's policies, procedures, and/or practices containing, referencing, or otherwise relating to
5 the review, correction, modification, alteration, and/or approval (by any AutoZone employee) of
6 time cards and hours worked by AutoZone hourly employees in Oregon, in effect for the time period
7 three (3) years prior to the filing of the Complaint in this matter, through the date of that filing.
8

9 **RESPONSE:** See, generally, documents identified in Response to RFP No. 7.

10
11
12 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents, reflecting, containing, or
13 otherwise relating to any and all discussions (including communications in any form) between, or
14 any training given or taken by, any AutoZone employees, regarding the hours worked (including but
15 not limited to start and end times, rest breaks, meal periods, and overtime) by AutoZone hourly
16 Oregon employees, during the period of time from two (2) years prior to the filing of the Complaint,
17 through the date of that filing.
18

19 **RESPONSE:** See, AZ/Migis 0001882-00002213.
20
21
22

23 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that are, or that reflect, contain or
24 otherwise relate to any and all policies, procedures, and/or practices implemented, modified or
25 changed, and/or any other actions taken, directed, approved, reviewed or otherwise implemented by
26

1 response to the complaint of *Joarnt et al. v. AutoZone*. See, also, pleadings filed by Plaintiff which
2 acknowledge that "some people may be members of both classes," identified, for this purpose, as
3 AZ/Migis 0002216-2218.
4
5
6

7 Dated: May 5, 2008
8

9 
10 Leigh Ann Collings Tift OSB No. 06473
11 LITTLER MENDELSON
12 A Professional Corporation
13
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Attorneys for Defendant
Autozone Inc.

Exhibit B

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY
08 APR -3 AM 11:54
FILED

ENTERED
APR - 7 2008
IN REGISTER BY EG

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

ORDER ON PLAINTIFF'S FIRST
MOTION FOR AN ORDER
COMPELLING DISCOVERY, AND
DETERMINING THE SUFFICIENCY
OF DEFENDANT'S RESPONSES TO
PLAINTIFF'S REQUESTS FOR
ADMISSION

~~PROPOSED~~

THIS MATTER having come before this Court upon Plaintiff's First Motion for an Order Compelling Discovery, and Determining the Sufficiency of Defendant's Responses to Plaintiff's Requests for Admission, and the Court having heard oral argument on March 7, 2008, reviewed the file, and being fully advised of the premise thereof, for the reasons stated on the record:

It is HEREBY ORDERED that:

- (1) Plaintiff's motion to deem Plaintiff's Requests For Admissions admitted is DENIED.
- (2) Defendant produce all documents in response to Request For Production Nos. 2, 4 and 6 in Plaintiff's First Set of Requests For Production, within 15

1 business days from the date of hearing on this matter, provided that these
2 Requests shall be limited to Oregon-based AutoZone employees paid on an hourly
3 basis.

4
5 (3) Defendant produce all documents responsive to Request For Production Nos.
6 7 and 8 in Plaintiff's Second Set of Requests for Production, within 15 business
7 days from the date of hearing on this matter.

8
9 (4) The parties confer on the scope of production for Request For Production Nos.
10 1 - 6 in Plaintiff's Second Set of Requests For Production. The Court has
11 subsequently been informed that Plaintiff and Defendant agree to the scope of
12 those Requests as follows, and Defendant shall produce all documents responsive
13 to the Requests, as modified, within 20 business days from the date of hearing on
14 this matter.

15 (a) Request No. 1 (transportation and driving policies and/or procedures): The
16 temporal scope of this Request shall be a total of one (1) year comprised of
17 the following time periods: from May 1, 2005 through August 2005; from
18 November 1, 2005 through February 2006; and from May 1, 2006 through
19 August 2006. This Request will be limited to documents representing a
20 complete set of the requested policies and procedures from the earliest date
21 set forth above, through the latest date set forth above, inclusive of any
22 changes to those policies and procedures.

23 (b) Request No. 2 (mileage reimbursement policy and/or procedure): The
24 temporal scope of this Request shall be a total of one (1) year comprised of
25 the following time periods: from May 1, 2005 through August 2005; from
26 November 1, 2005 through February 2006; and from May 1, 2006 through

Page 2 -

ORDER ON PLAINTIFF'S FIRST MOTION FOR ORDER COMPELLING DISCOVERY

1 August 2006. This Request will be limited to documents representing a
2 complete set of the requested policies and procedures from the earliest date
3 set forth above, through the latest date set forth above, inclusive of any
4 changes to those policies and procedures.

5 (c) Request No. 3 (merchandise and/or parts delivery and pick-up schedule(s)):

6 No changes; Defendant shall respond to the Request as drafted.

7 (d) Request No. 4 (documents and reports including Missed Lunch Reports and

8 Lunch Variance Reports): The temporal scope of this Request will be a total
9 of one (1) year comprised of the following time periods: from May 1, 2005
10 through August 2005; from November 1, 2005 through February 2006; and
11 from May 1, 2006 through August 2006.

12 (e) Request No. 5 (Weekly Schedule reports referencing Plaintiff Migis's

13 approved and unapproved work schedules): No changes; Defendant shall
14 respond to the Request as drafted.

15 (f) Request No. 6 (documents and reports reflecting weekly summarization of

16 hours worked by Plaintiff Migis): No changes; Defendant shall respond to the
17 Request as drafted.

18
19 SIGNED on this 2 day of April 2008.

20
21
22 THE HON. JEROME LABARRE
23 Multnomah Co. Circuit Court
24
25
26

1 APPROVED AS TO FORM:
2 BAILEY, PINNEY & ASSOCIATES, LLC
3

4 /s/
A.E. "BUD" BAILEY, OSB NO. 87157
5 bbailey@wagelawyer.com
CHEY K. POWELSON, OSB NO. 03551
6 cpowelson@wagelawyer.com
1498 SE Tech Center Pl, Ste 290
7 Vancouver, WA 98683
Phone: 360.567.2551
8 Fax: 360.567.3331
Attorneys for Plaintiff
9

10 LITTLER MENDELSON
11

12 /s/
13 DOUG PARKER, OSB NO. 821017
NEIL OLSEN, OSB NO. 053378
14 LITTLER MENDELSON, P.C.
1750 S.W. Harbor Way, Suite 450
15 Portland, Oregon 97201
Phone: 503-221-0309
16 Fax: 503-242-2457
Of Attorneys for Defendant
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18
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25
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Page 4 - ORDER ON PLAINTIFF'S FIRST MOTION FOR ORDER COMPELLING DISCOVERY

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law
1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

EXHIBIT B
Page 4

Exhibit C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S FIRST SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
PLAINTIFF'S SECOND SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Defendant AutoZone, Inc. ("Defendant") hereby submits its objections and responses to
Plaintiff's Second Set of Requests for Production of Documents as follows:

GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this
lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery
requests to the extent they purport to require any actions not required by the Oregon Rules of Civil
Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this
objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope
of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to
lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation
greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests
to the extent they call for information or documents that fall within any relevant privilege (including

PAGE 1 -- DEFENDANT'S 1st SUPPL. OBJECTIONS AND RESPONSE
TO PLAINTIFF'S SECOND RFP'S

Littler Mendelson, PC
1750 SW Harbor Way, Suite 450
Portland, OR 97201
Phone: 503-221-0200 Fax: 503-242-2450

EXHIBIT C

Page 143

1 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents and reports reflecting
2 any weekly summarization of hours worked by Plaintiff, whether individually or by inclusion in a
3 larger group, for the period of time from three (3) years prior to the filing of the Complaint, up to
4 present.

5 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
6 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
7 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
8 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
9 Yamaoka's Fourth Requests for Production, RFP No. 9, in Cause No. 053-02795.

10 **SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, *see*, attached AZ/MIGIS
11 000552-000707.

12
13
14 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents or records such as
15 security logs, or records, identifying when a security system in any AutoZone store in which
16 Plaintiff worked was activated and/or deactivated during Plaintiff's employment period.

17 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
18 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
19 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
20 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
21 Yamaoka's Fourth Requests for Production, RFP No. 11, in Cause No. 053-02795.


22 **SUPPLEMENTAL RESPONSE:** Defendant will produce these logs.
23
24
25
26

1 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that identify, or which
2 record or can be used to identify, the names of the persons activating and/or deactivating security
3 systems at stores in which Plaintiff worked for AutoZone during Plaintiff's employment period.

4 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
5 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
6 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
7 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
8 Yamaoka's Fourth Requests for Production, RFP No. 12, in Cause No. 053-02795.

9 **SUPPLEMENTAL RESPONSE:** Defendant has been unable to identify records related to
10 Plaintiff Migis responsive to this request. Defendant continues to search and will supplement to the
11 extent that records are identified.

12
13 Dated: March 28, 2008

14
15 
16 Leigh Ann Collings Tift OSB 05473
17 Douglas S. Parker OSB No.82101
18 LITTLER MENDELSON
19 A Professional Corporation

20
21 Attorneys for Defendant
22 Autozone Inc.
23
24
25
26

Exhibit D

MAY-23-2008 15:54

BAILEY PINNEY

Payroll Weekly Hours Summary Report *** AutoZone 2229 *** 01/08/2005
21:08:48
Page 1

AUTOZONER	REG HRS	VAC HRS	INV HRS	PRG NSW	TRN HRS	COM HRS	OTH HRS	HRS PD	TOT OT
BAZANKE, PEDRO	17:50	-	-	-	-	-	-	17:50	-
EVANS, JASON	13:26	-	-	-	-	-	-	13:26	-
FLORES, JAVIER	11:23	-	-	-	-	-	-	11:23	-
GENERIC MAIL US	-	-	-	-	-	-	-	-	-
HAMILTON, DANIE	11:14	-	-	-	-	-	-	11:14	-
HAYASHI, PATRIC	38:19	-	-	-	-	-	-	38:19	-
LUNA, NOE	15:16	-	-	-	-	-	-	15:16	-
MARTINEZ, GUADA	11:14	-	-	-	-	-	-	11:14	-
NARAYAN, RAJ	37:56	-	-	-	-	-	-	37:56	-
REYES, MARTIN	38:10	-	-	-	-	-	-	38:10	-
SUHL, DAVID	40:30	-	-	-	6:00	-	-	46:30S	-
Total	235:18	-	-	-	6:00	-	-	241:18	-

AUTOZONER	MAINT TECH	TRUCK DR	CONTR SEC	OTHER HRS
11-1111	-	0:04	-	-
84-9333	5:47	-	-	-

S - Salaried Autozoner.

AZPB000812

EXHIBIT

Page

Exhibit E

Per 12 wk
Payroll Weekly Hours Summary Report *** AutoZone 2229 *** 07/12/2003
21:09:04
Page 1

AUTOZONER	REG HRS	VAC HRS	INV HRS	SCK HRS	PRG NEW	TRN HRS	COM HRS	OTH HRS	HRS FD	TOT OT
ASTORIAS,	12:01	-	-	-	-	-	-	-	12:01	-
CABRERA,	8:12	-	-	-	-	-	-	-	8:12	-
COSTACHE,	42:02	-	-	-	-	-	-	-	42:02	(3202)
FLORES, J	28:50	-	-	-	-	-	-	-	28:50	-
GENERIC M	-	-	-	-	-	-	-	-	-	-
LAVIOLETTE	29:19	-	-	-	-	-	-	-	29:19	-
NARAYAN,	39:35	-	-	-	-	-	-	-	39:35	(3202)
NAVA GOMEZ	20:40	-	-	-	-	-	-	-	20:40	-
SALTORS,	7:00	-	-	-	-	-	-	-	7:00	-
SUEL, DAY	50:00	-	-	-	-	-	-	-	50:00	-
Total	237:39	-	-	-	-	-	-	13:27	251:06	8:44

AUTOZONER.	MAINT TECH	TRUCK DR	CONTR SEC	OTHER HRS
99-9999	-	0:23	-	-

8 - Salaried AutoZoner.

AZPB001520

EXHIBIT *E*

Page *1*

Exhibit F

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

CHEY POWELSON

Telephone (360) 567-2551
Facsimile (360) 567-3331
e-mail: CPowelson@wagelawyer.com

* Washington License WWSA 34593
* Oregon License OSB 03551

April 1, 2008

VIA FAX & MAIL: (503) 961-7854

Mr. Neil Olsen
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

Re: *Migis v. AutoZone, Inc.*
(Mult. Co. Cir. Court No. 0711-13531)

Neil:

To clarify, for Plaintiff's Request For Production No. 5 (employee time records) in the Third Set of discovery requests, the phrase "electronic format" means usable electronic format, not .pdf, as AutoZone retains that information or as can otherwise be extracted using a mainframe database extraction program, such as OnDemand 32.

Please call me to discuss this issue, or if you have any other questions. Thanks.

Sincerely yours,



Chey K. Powelson
Attorney for Plaintiffs

EXHIBIT F
Page 1

MAY-23-2008 15:55

BAILEY PINNEY

P.037

***** -COMM. JOURNAL- ***** DATE APR-01-2008 ***** TIME 14:01 *****

* MODE = MEMORY TRANSMISSION

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-BAILEY PINNEY

***** UF-8000 v2 ***** -3605673331

- ***** -

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

Tel: 1-800-482-8351
Fax: 360-567-3331

CS

April 1, 2008

PERSONAL AND CONFIDENTIAL

TO: Olsen, Neil

FAX NO. (503) 961-7854

Number of Pages (including cover page): 2

RE: *Migis v. Autozone*

Electronic Format

IF YOU DID NOT RECEIVE ALL PAGES, CONTACT ME IMMEDIATELY AT (360) 567-2551

COMMENTS: ORIGINAL DOCUMENTS
Regular mail

NOTICE TO RECIPIENT

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EXHIBIT

F.

Page

2

Exhibit G

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

2/4



May 8, 2008

Leigh Ann Tift
Direct: 206.381.4905
Direct Fax: 206.447.6965
lraft@littler.com

VIA MAIL AND FACSIMILE

Chey Powelson
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: *Migis v. AutoZone, Inc.*
Multnomah County Circuit Court Case No. 0711-13531

Dear Mr. Powelson:

This is in response to your most recent letter regarding the second 39C deposition notice and our discovery conference this morning. In your letter of May 2, 2008 regarding the location of the 39C deposition, you state: "Defendant still appears to be under the impression that it must produce one or more ORCP 39C(6) designees who are 'qualified' to testify based upon their personal knowledge [in response to these notices]."

We do not believe that the witnesses need to testify on the basis of personal knowledge. I am well aware that corporate knowledge of a witness will suffice for this purpose. I am also well aware of the requirement that the corporation produce the most qualified person to testify on its behalf. See, *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 798 (9th Cir. 2003); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 17 (1st Cir. 2000) (corporation must identify person who best speaks for it on 30(b)(6) subjects). As I have explained to you numerous times, AutoZone's payroll employees, and specifically the person knowledgeable about the subjects you identify in your deposition notice, all live and work in Memphis. None are resident in the state of Oregon. AutoZone cannot teach its store managers or area managers in Oregon an area entirely outside their job responsibilities and then designate them as a person best able to speak to AutoZone payroll policies and programs and will not do so. The second 39C designee will be available for deposition in Memphis. If you want to take a telephone or video deposition, that is acceptable to us.

You asked about the designee for the first 39C deposition and whether that person will be prepared to speak to all subjects in the notice—you specifically mentioned AutoZone's defense of laches, and your contention that the company must produce a fact witness to show that it was materially harmed by delay. I maintain that most of what you spoke of is legal theory, or application of law to facts, but to the extent that the witness can testify without

Chey Powelson
May 8, 2008
Page 2

disclosing attorney client communications or work product, we will produce an appropriate witness next week.

With respect to the lengthy discovery conference this morning, lasting more than 1 1/2 hours, please note that I have offered to look at documents you designate to see if we will stipulate to their authenticity. You indicate you feel you should not have to spend the time identifying these documents, but did, eventually, ask that I review Bates-labeled documents AZ/Migis 282-294 and something you called the "Q-2 earnings report." I've looked at Bates labeled documents AZ/Migis 282-294, and we will stipulate that these documents, and any others that are titled "Employee 200_ [inserting the noted year and quarter] Earnings Record" are what they purport to be—that is, a report of an employee's earnings by quarter. You asked that I also stipulate that "everything like them" is authentic. I'm not able to enter into such a stipulation, but if you want to identify documents, or even Bates ranges, I will, as I said, look at them and give you our answer.

You asked that AutoZone produce all of Mr. Migis' work schedules. As I think you know, from the previous case, AutoZone managers do not always retain work schedules. A work schedule is a plan—it does not represent the actual hours worked. AutoZone does keep proper records of hours worked, but does not necessarily keep work schedules. I believe you have what there is to produce in regard to Mr. Migis' past work schedules, but if there are schedules that are located as this case progresses, we will produce them. The same is true for any other documents that are located and are responsive to discovery requests.

You asked for an electronic copy of the lunch variance report we sent you in hard copy. I will have a disk sent to you.

You asked me to send a corrected copy of my declaration in support of our opposition to the motion for attorney fees. If I mistakenly attributed a conversation to the wrong day, I will make sure the court is aware of the mistake.

You suggested that AutoZone did not produce all emails relative to your RFP # 2 because, you posit, AutoZone managers "must be emailing" one another "all the time" about wage and hour matters. I told you I'd seen nothing that would lead me to believe that was true. You also seem to forget that this Request does not ask about emails about "wage and hour matters," it is much more specific than that. You asked me if I include all HR managers when I said I had not seen anything that led me to believe your hypothesis was correct, and I responded, and want to reiterate, that we are talking about specific discovery requests, not my personal opinions—or yours—about the content of email traffic within AutoZone.

You suggested that AutoZone had not complied with its obligation to provide Plaintiff with a "weekly summarization of hours" in response to RFP No. 4. AutoZone provided Plaintiff with exactly what was requested.

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

4/4

Chey Powelson


May 8, 2008

Page 3

We had an extended discussion about Plaintiff's demand for every time record for every employee employed by AutoZone in Oregon for the one year period preceding the filing of the Migis complaint. You initially asked if AutoZone would stipulate to class certification. We will not. Next, you suggested that you would agree to accept 1 out of every 5th employee's records, if I would stipulate that that sample was representative. I asked if you would also stipulate that those records were representative, which you declined to do. You then changed your mind and said you would accept 1 out of every 3rd employee's records if I would stipulate that the records were representative, but again declined to do so on behalf of Plaintiff. Next you said you might consider that stipulation if I would agree you could depose the person who randomly selected the employee's whose records were produced. Ultimately, you changed your mind about that, too, and said you intended to move to compel all time records for all employees.

Finally, I am compelled to address the conclusion of our conversation. I felt that the conversation degenerated into comments that were completely unprofessional and sometimes bizarre (the "metaphysical truth" part, for example). I would appreciate it if you would refrain from this kind of conversation in the future. I think that these discovery conference should be much briefer and more to the point.

Sincerely,


Leigh Ann Tift

cc: Tanya Holmes
Amy Alpern

Firmwide:85145353.1 013306.2124

EXHIBIT 6
Page 3

MAY-23-2008 15:56

BAILEY PINNEY

P.042

May-08-2008 02:55 PM LITTLER MENDELSON P.C. (206) 447-6965

1/4



FACSIMILE COVER SHEET

May 8, 2008

To: Chey K. Powelson
Bailey, Pinney & Associates, LLC

Fax: 360.567.3331 Phone: 360.567.2551

Fax #(s) verified before sending (initial):

From: Leigh Ann Tift

Fax: 206.447.6965 Phone: 206.381.4905

Length, including this cover letter: 4 Pages

If you do not receive all pages, please call Savanna L. Stevens at 206.381.4932.

Message:

Firmwide: 85051576.1 013306.2124

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Transmittal Completed: _____ am / pm Client Code: _____ User Number: 1860

Exhibit H

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

CHEY POWELSON
Telephone (360) 567-2551
Facsimile (360) 567-3331
e-mail: CPowelson@wagelawyer.com

* Washington License WSBA 34593
* Oregon License OSB 03551

May 9, 2008

VIA E-MAIL ONLY

Ms. Leigh Ann Tift
ltift@littler.com
One Union Square
600 University St, Ste 3200
Seattle, WA 98101-3122

Re: Migis v. AutoZone, Inc. (Multnomah Co. Circuit Court No. 0711-13531)
Follow-up to 05-08-08 Telephonic Discovery Conference

Ms. Tift:

This is to follow up what we discussed yesterday morning in our phone conversation on various discovery issues.

Proposed Stipulation to the Authenticity of Defendant's Own Documents

In regards to the issues in my April 23 letter, you refused to stipulate to Plaintiff propounding additional Requests For Admission to determine the authenticity of all documents Defendant has produced (and which appear to be business records).

You then requested that I give you a list of documents Plaintiff would like Defendant to stipulate to in regards to authenticity. I gave you certain examples, which you identify in your follow up letter of yesterday, and agreed to stipulate to (the "everything like them" I referred to in the conference are in fact those "Employee 200_" documents you identified in your letter).

As for the remaining categories of documents, please stipulate to the authenticity of the following categories of documents:

1. AZ/MIGIS 0000295 - 486 (SMS Time Final Historical Reports)
2. AZ/MIGIS 0000487 - 550 (driving policies)
3. AZ/MIGIS 0000551 (meal period report)
4. AZ/MIGIS 0000552 - 707 (SMS Time Final Historical Reports)

EXHIBIT H
Page 1

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008

2

5. AZ/MIGIS 0000708 - 753 (SMS Time Final Historical Reports)
6. AZ/MIGIS 0000754 - 1211 (security/alarm logs)
7. AZ/MIGIS 0001220 - 1235 (meal period report)
8. AZ/MIGIS 0001236 - 1252 (travel policy)
9. AZ/MIGIS 0001253 - 1288 (meal period report)
10. AZ/MIGIS 0001289 - 1346 (AutoZoner Time Cards)
11. AZ/MIGIS 0001347 (Termination Report) ; AZ/MIGIS 0001348 - 1457 (Job Data)
12. AZ/MIGIS 0001458 - 1620 (Job/Pay Data)
13. AZ/MIGIS 0001621 - 1655 (AutoZone Store Handbook)
14. AZ/MIGIS 0001656 - 1817 (Paycheck Data)
15. AZ/MIGIS 0001818 - 1881 (Termination Reports)
16. AZ/MIGIS 0001882 - 2037 (*Foundations* manuals/handbooks)
17. AZ/MIGIS 0002038 - 2068 (Being a Manager)
18. AZ/MIGIS 0002069 - 2213 (Being a Manager)
19. AZ/MIGIS 0002214
20. AZ/MIGIS 0002215 (Mark Dessem e-mail)
21. AZ/MIGIS 0000001 - 294 ("Personnel file")

Otherwise, Defendant will not stipulate to Plaintiff propounding Requests For Admission beyond the number the Oregon Rules permit.

Work Schedules and Management Action Plans

Per my April 28 letter (and relating to a Court Order on this matter), I inquired as to whether Defendant will produce additional work schedules relating to Mr. Migis. I referenced Judge Kantor's preservation order in the *Joarnt* case, and surmised that those schedules should have been retained.

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Page 2

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008
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I also referenced Defendant's non-production of any "Payroll Weekly Hours Summary Reports," which shows a store's employees' names, regular hours worked and paid, and any overtime hours paid. I referenced *Joarni* document production as an example: AZPB0001520.

Again, this is information Defendant should have retained pursuant to Judge Kantor's preservation order, and also produced in this case in response to the Court's Order on Plaintiff's Second Set of Requests For Production 5 - 6.

Nonetheless, you represented Defendant had made a diligent search, and although Defendant has complied with the Court's Order referenced above, Defendant will continue to look for responsive documents.

Missed Lunch and Lunch Variance Reports

You committed to producing these reports in Excel format, to the extent AutoZone has it.

Additional Termination Reports in Response to the Second Court Order

Defendant has produced all such reports it has located. I nonetheless indicated that due to the non-production of approximately 96 Termination Reports, Plaintiff in his supplemental briefing to the Court will request additional relief, based on the non-production of this information.

This non-production becomes even more important because: (a) the information exists electronically in the summary report (Bates No. AZ/MIGIS 0001212, *et seq.*), and (b) Defendant represented to the Court that only by producing the Termination Reports would Defendant be able to show that the apparent "late pays" on the summary report were not really late.

Defendant's Declaration Supporting Objection to Plaintiff's Attorneys' Fees

I urged correction of this document, so as to avoid any undue and un-necessary confusion at hearing on this matter. You committed to correcting the declaration if and where appropriate.

Defendant's Responses to Plaintiff's Third Set of RFPs

1. RFP Nos. 1 - 2: You stated that the Mark Dessem e-mail (0002215) is the only one that presumably exists.

I also disagree with your follow up letter of yesterday; during the conference I did not say that managers are e-mailing all the time on wage and hour issues, but are probably e-mailing all the time (I referred to you Bates No. 0002159 re: "Communication"), and such e-mails should include wage and hour issues.

Ms. Leigh Ann Tift - *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008

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It is very unlikely Oregon AutoZone managers have never, for the time period referenced, sent or received any e-mail or memoranda on employee hours, wages and the like in Oregon.

2. **RFP No. 3:** You represented Defendant could not find Daily Coverage Lists (reports) at present. Again, this is concerning in light of Defendant's prior preservation obligations.
3. **RFP No. 4** (all documents and reports reflecting any weekly summarization of hours worked by AutoZone employees): You represented that Defendant has fully complied with this discovery request by producing *one* report in Excel format. I strongly disagreed because the Request seeks "all documents and reports," not one report.

I further requested that Defendant produce more relevant documents such as the "Payroll Weekly Hours Summary Report," and referenced the *Joarnt* document production by way of example: AZPB0001520, 1463, and 0000812.

5. **RFP No. 5:** I asked you to stipulate to class certification if AutoZone is refusing to produce one year's worth of time records. You refused and stated that we have Plaintiff's own time records. I therefore requested that Defendant stipulate to Plaintiff's records as representative of the entire class, and that he is an adequate class representative (including having suffered common and typical claims).

You refused that offer as well, at which point I again requested the time records. In an effort to brainstorm to an amicable solution, I proposed production of a random selection of, for example, one out of four or five, provided Defendant would stipulate that such time records would be representative of the one year's worth. You said no.

I stated that if you could not stipulate then Plaintiff would have to compel the entire year's worth of records. You then asked me if I would stipulate to the time records being representative; I was unsure whether I could do that because Defendant, not Plaintiff, is in the best position to know whether those records are truly representative.

I also asked that if I did stipulate, would Defendant not use that to somehow oppose numerosity or the like. You could not agree to that, so I proposed one out of every three people, provided that Defendant allow Plaintiff to depose the IT person who compiles that those time records.

I then agreed to send you a proposal in writing, but in your follow up letter you are under the impression that I would not send a proposal. Therefore, please consider the proposal withdrawn; Plaintiff will move to compel.

6. **RFP Nos. 6 - 8:** You represented Defendant has produced everything thus far located, but will produce additional documents to the extent they are found.

EXHIBIT 14
Page 7

Ms. Leigh Ann Tift – *Migis v. AutoZone, Inc.* (Follow-up to 05-08-08 Disc. Conf.)
09 May 2008
5

You further stated that you didn't find that AutoZone managers e-mail each other about wage and hour issues. Rather, you represented that Defendant "communicates" via policies, handbooks and training.

I further referred you to *Joarnt* document production as an example of other documents that Defendant should have produced: AZ 1010, 1012.

7. RFP No. 9: We could not agree as to this issue; I reiterated the reasoning in my May 1 letter.
8. RFP No. 10: I asked whether you had the opportunity to read the *AutoZone, Inc. v. Ferrell Air Conditioning & Heating*, case, but you had not. You represented that discovery is ongoing.
9. RFP Nos. 11 - 13: We were not able to make any headway on issues related to these Requests.

Finally, in regards to your comments on the conference degenerating into unprofessional matters such as my reference to "metaphysical truth," you seemed rather interested in that topic, which I initially mentioned only in passing on the rhetorical question of whether a stipulation actually makes something true.

In the future and for your convenience I will refrain making any references that could be construed as humor. You are correct to imply that this is a serious matter.

For my convenience and in the spirit of professionalism, however, I would ask you refrain from injecting an undue number of sarcastic comments into the conversation (e.g., asking me if I need help spelling), as it does not contribute positively to the issues at hand.

Overall, however, though we disagree on many matters, I think you'll agree it could be worse.

Thank you for your patience, and I look forward to further conferences with you.

Sincerely,

/s/

Chey K. Powelson
Attorney for Plaintiff

EXHIBIT H
Page 5

Chey Powelson

From: Chey Powelson
Sent: Friday, May 09, 2008 3:08 PM
To: Tift, Leigh Ann C.
Cc: Bud Bailey; Brad Griffin; Charity Shindle; Alpern, Amy R.
Subject: Migis v. AutoZone – Follow up to 05-08-08 Disc. Conf.
Follow Up Flag: Follow up
Flag Status: Red
Attachments: To Defendant_Follow Up Disc Conf_05-09-2008.pdf

Ms. Tift:

See attached letter. Thanks.

Chey K. Powelson
Attorney at Law
Bailey, Pinney & Assoc., LLC
1498 SE Tech Center Pl, Ste 290
Vancouver, WA 98683
Cpowelson@wagelawyer.com
360.567.2551 (Ph)
360.567.3331 (Fax)

Confidentiality Notice: This e-mail message may contain confidential and privileged information. If you have received this message by mistake, please notify me immediately via telephone, and do not review, disclose, copy, or otherwise distribute it. Thank you.

5/23/2008

EXHIBIT H
Page 10

Exhibit I

Deposition of MARK DESSEM, taken on August 25, 2005

Page 1

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH

3 RICHARD JOARNT AND BERT YAMAOKO,
4 individually, and on behalf of all
5 others similarly situated PLAINTIFFS
6 VS. NO. 0503-02795
7 AUTOZONE, INC., a Foreign Corporation DEFENDANT
8

9 *****

10 DEPOSITION OF MARK DESSEM

11 *****

12

13

14

15 TAKEN AT THE INSTANCE OF THE PLAINTIFFS
16 IN THE OFFICES OF THE SHELBY COUNTY COURTHOUSE
17 40 ADAMS AVE. RM
18 ON AUGUST 25, 2005,

17

18

(APPEARANCE)

J

19

20

21

Reported by: REGINA D. F

22

23

ADVANCED C

P.O. BOX 761

24

TUPELO, MS 38802-0761

(662) 690-1500

25

ADVANCED COURT REPORTING
(662) 690-1500

EXHIBIT I
Page 1

Deposition of MARK DESSEM, taken on August 25, 2005

Page 2

1 APPEARANCES:

2 For the Plaintiffs: A. E. BUD BAILEY, ESQUIRE
Bailey, Pinney & Associates, LLC
3 Columbia Tech Center
1498 SE Tech Center Place
4 Suite 290
Vancouver, Washington 98683
5 (360) 567-2551
6

For the Defendant: LEIGH ANN COLLINGS TIFT, ESQUIRE
7 Littler Mendelson
701 Fifth Avenue, Suite 6500
8 Seattle, Washington 98104-7097
(206) 623-3300
9

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Deposition of MARK DESSEM, taken on August 25, 2005

Page 61

1 in and manipulate that.

2 Q. So this report that we've seen in Exhibit 1
3 and Exhibit 3, is that the payroll register?

4 A. No. No. This is a time card.

5 Q. These are just time card reports?

6 A. Yes.

7 Q. Okay. When you do a payroll register then,
8 your record then is a 48,000 employee record. Is it
9 an alpha record? I mean, is it all by -- first of
10 all, is it a 48,000 employee record?

11 A. No.

12 Q. Is it set up that way?

13 A. Well, ultimately on the entire report,
14 everybody is going to appear. But it is first, I
15 believe, broken down by what we call pay group, which
16 is going to separate people into different pay
17 groups. And then within pay group, it would be
18 broken down, I believe, by store.

19 Q. Okay. So if you had the store numbers for
20 each geographic area by state, would it be possible
21 to manipulate that record to be able to just provide
22 all the individuals that were working in Oregon, for
23 example, for a given period of time, whether it be
24 one pay period or for several pay periods?

25 A. Yes. It could be done. It would be

Deposition of MARK DESSEM, taken on August 25, 2005

Page 62

1 cumbersome to do it, because you'd have to go in and
2 work your way around and basically do screen prints
3 and that sort of thing. But you could probably get
4 to where you were --

5 Q. Do you know whether or not there is a
6 separate data system that's used to maintain
7 personnel information that, on a particular snapshot
8 day, that -- for example, a list of all the employees
9 that work in a particular geographic area, such as
10 Oregon, could be identified and printed out all at
11 once?

12 A. Again, if you're -- ask that again? On a
13 given day? Who worked on a given day?

14 Q. Yes. Or, even more specific, if we have a
15 period from a date back so many years, we want to
16 know all the names of the people who worked in
17 Oregon, is there a payroll or personnel record that's
18 kept by computer that stores that information that
19 could be downloaded and printed?

20 A. Outside of the payroll register, it would
21 be difficult. I'm not saying it can or can't be
22 done. Again, that's more of an IT thing, because
23 you're trying to go into the system and pull data
24 out. And if I'm understanding you, you're saying,
25 hey, I want to see all the people that worked in

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT AND BERT YAMAOKO,
individually, and on behalf of all
others similarly situated

PLAINTIFFS

VS.

NO. 0503-02795

AUTOZONE, INC., a Foreign Corporation

DEFENDANT

DEPOSITION OF MARK DESSEM

TAKEN AT THE INSTANCE OF THE PLAINTIFFS
IN THE OFFICES OF THE SHELBY COUNTY COURTHOUSE
40 ADAMS AVE. RM 228, MEMPHIS, TENNESSEE
ON AUGUST 25, 2005, BEGINNING AT 8:55 A.M.

(APPEARANCES NOTED HEREIN)

Reported by: REGINA D. RUSSELL, CSR 1110

ADVANCED COURT REPORTING
P.O. BOX 761
TUPELO, MS 38802-0761
(662) 690-1500

ORIGINAL

EXHIBIT I

Page 5

C E R T I F I C A T E

STATE OF MISSISSIPPI)

COUNTY OF LEE)

RE: ORAL DEPOSITION OF MARK DESSEM

I, Regina D. Russell, CSR 1110, a Notary Public within and for the aforesaid county and state, duly commissioned and acting, hereby certify that the foregoing proceedings were taken before me at the time and place set forth above; that the statements were written by me in machine shorthand; that the statements were thereafter transcribed by me, or under my direct supervision, by means of computer-aided transcription, constituting a true and correct transcription of the proceedings; and that the witness was by me duly sworn to testify to the truth and nothing but the truth in this cause.

I further certify that I am not a relative or employee of any of the parties, or of counsel, nor am I financially or otherwise interested in the outcome of this action.

Witness my hand and seal on this 1st day of September, 2005.

My Commission Expires: CSR 1110
May 27, 2008 Notary Public

Exhibit J

AutoZoner Time Card

*** AutoZone 2236 ***

11/19/2005
21:17:06
Page 1

AutoZoner Name: MIGIS, MICHAEL

AutoZoner ID: 10090549

Day Of Week	Date	Daily Hours	Clock In	Clock Out	Change Reason
Sunday	11/13/2005	7:03	11:12	15:42	
			16:53	19:26	
Monday	11/14/2005	0:01	19:27	19:27	
Tuesday	11/15/2005	-			
Wednesday	11/16/2005	5:56	7:39	13:35	
Thursday	11/17/2005	7:37	12:41	17:06	
			18:10	21:22	
Friday	11/18/2005	8:38	7:37	12:48	
			14:02	17:29	
Saturday	11/19/2005	7:08	12:58	16:20	
			17:30	21:16	
Total Hours		36:23			

AutoZoner Signature: _____

Management Signature: _____

Store Copy

EXHIBIT

Page

AZ/MIGIS 0001333

Exhibit K

AutoZoner Time Card

*** AutoZone 2236 ***

09/03/2005
21:44:52
Page 1

AutoZoner Name: MIGIS, MICHAEL

AutoZoner ID: 10090549

Day Of Week	Date	Daily Hours	Clock In	Clock Out	Change Reason
Sunday	08/28/2005	7:41	22:18	9:41	-11:23 AutoZoner Failed To Clock Out
			10:57	16:12	
			17:06	19:30	
Monday	08/29/2005	-			
Tuesday	08/30/2005	-			
Wednesday	08/31/2005	8:10	12:41	16:58	
			17:48	21:41	
Thursday	09/01/2005	7:52	21:42	21:44	
			13:06	16:47	
			17:46	21:10	
			21:10	21:56	
Friday	09/02/2005	9:46	7:37	17:23	
Saturday	09/03/2005	7:48	12:55	16:56	
			17:56	21:43	
Total Hours		41:17			

AutoZoner Signature: _____

Management Signature: _____

Store Copy

EXHIBIT K
Page 1

AZ/MIGIS 0001323

Exhibit L

ENTERED
MAR 29 2006
IN REGISTER BY RK

FILED
06 MAR 27 AM 11:23
CLERK OF COURT
FOR MULTNOMAH COUNTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT and BERT
YAMAOKO, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

No. 0503-02795

ORDER ON PLAINTIFFS' MOTIONS
FOR ORDER REQUIRING
DEFENDANT TO PRESERVE
EVIDENCE AND FOR PROTECTIVE
ORDER, AND ON DEFENDANT'S
MOTION TO ENJOIN PLAINTIFFS
FROM CONTACTING
REPRESENTED PARTIES AND
MOTION FOR PROTECTIVE
ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS
MEMBERS

THIS MATTER, having come before the Court upon Plaintiffs' and Defendant's above-referenced Motions, and the Court having reviewed the file, and being fully advised of the premise thereof during hearing of these Motions on January 27, 2006; the Court hereby **ORDERS** that:

1. Defendant's Motion to Enjoin Plaintiffs from Contacting Represented Parties and Motion for Protective Order Limiting Plaintiffs' Contact with Putative Class Members, is **DENIED**. Plaintiffs are allowed to conduct investigation and contact AutoZone employees and store managers as part of such investigation; **PROVIDED**, however, that such contact include a disclosure that the investigation is related to the employee's experience as an hourly employee. **MOREOVER**, Plaintiffs are not entitled to directly contact current district managers or other current employees occupying positions of authority above the district manager level, regarding this case without permission of Defendant and/or the Court except to

Page 1 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS MEMBERS

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 587-2551 • Fax (360) 587-2221

EXHIBIT L

Page 1-3

1 determine if the person is a district manager or other person with whom contact is restricted.
2 Defendant shall provide Plaintiffs with a list of such individuals whom Defendant believes
3 Plaintiffs are not entitled to contact, PROVIDED, HOWEVER, that Defendant's duty to
4 provide this information is STAYED in accordance with Paragraph 4 of this Order.

5 2. In regards to Plaintiffs' Motion for Order Requiring Defendant to Preserve
6 Evidence and Motion for Protective Order:

7 a. Plaintiffs' Motion for Protective Order (restricting Defendant's
8 communications with putative class members) is **DENIED**. Defendant may conduct
9 investigation to prosecute and defend their claims and defenses; PROVIDED, however,
10 Defendant does not try to persuade any putative class members to not participate in the class.

11 b. Plaintiffs' Motion for Order Requiring Defendant to Preserve Evidence
12 is hereby **GRANTED** to the extent that Defendant will preserve all contents of currently-
13 existing (from November 2004 and later) Oregon AutoZone store "period boxes," or any
14 future boxes that are created and maintained during the course of this lawsuit, for all
15 AutoZone stores in the State of Oregon. FURTHERMORE, Defendant will arrange for the
16 storage of those boxes and their contents in such a way that provides Plaintiffs reasonable
17 access to review and copy the contents of those boxes. Plaintiffs are not entitled to documents
18 containing confidential information that is entirely unrelated to the claims or defenses in this
19 lawsuit. If the parties disagree over the discoverability of one or more documents contained
20 in any of the period boxes, Plaintiffs are entitled to copy that document or documents and
21 move the Court for a ruling as to the disputed document or documents' discoverability.

22 3. All requests for costs and attorneys fees and/or sanctions as made in the above-
23 referenced Motions are **DENIED**.

24 ///

25 ///

26 ///

Page 2 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS MEMBERS

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683

EXHIBIT L

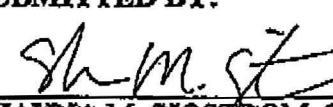
Page 2-3

1 4. This case is STAYED in its entirety pending resolution of Plaintiff's appeal of
 2 this Court's order on Defendant's Motion for Judgment on the Pleadings. This stay, however,
 3 does not affect the parties' respective rights to conduct appropriate investigation.

4
 5 ORDERED this 24th day of March 2006.

6
 7 
 8 THE HONORABLE HENRY KANTOR
 9 MULTNOMAH CO. CIRCUIT COURT JUDGE

10 SUBMITTED BY:

11 
 12 SHAUNA M. SJOSTROM, OSB 04418
 13 Of Attorney for Plaintiffs

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 Page 3 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
 AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
 CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
 CONTACT WITH PUTATIVE CLASS MEMBERS

BAILEY PINNEY & ASSOCIATES LLC
 Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683

EXHIBIT L

Page 3-3

TOTAL P.064

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

Tele: 1-800-882-8351
Fax: 360-567-3331

CS

May 23, 2008

PERSONAL AND CONFIDENTIAL

TO: Ms. Amy R. Alpern

FAX NO. (503) 914-1816

Number of Pages (including cover page): 64

RE: *Migis v. Autozone*

Plt 2nd Motion to Compel

IF YOU DID NOT RECEIVE ALL PAGES, CONTACT ME IMMEDIATELY AT (360) 567-2551

COMMENTS: ORIGINAL DOCUMENTS
Regular mail

NOTICE TO RECIPIENT

The information contained in this facsimile is intended only for the use of the individual or entity named above and may contain attorney privileged information. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify me by telephone (collect calls will be accepted) and destroy the information contained in this facsimile.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S MOTION FOR
PROTECTIVE ORDER AND
MEMORANDUM IN SUPPORT THEREOF**

[ORAL ARGUMENT REQUESTED]

I. REQUEST FOR ORAL ARGUMENT

Pursuant to UTCR 5.050, oral argument is requested. The time for oral argument is estimated to be 20 minutes. Court reporting services are requested.

II. UTCR 5.010 CERTIFICATE OF COMPLIANCE

AutoZone hereby certifies that counsel for Defendant conferred with Chey Powelson and Bud Bailey counsel for Plaintiff, on May 16, 2008 on the issues set out in this motion. Counsel for the parties were unable to resolve this dispute.

III. MOTION

Pursuant to ORCP 36C, Defendant, AutoZone, requests that the Court:

1. Enter an Order of Protection related to Plaintiff's 39C(6) deposition notice demanding that AutoZone produce a nonresident corporate witness in Oregon for the purpose of deposition. AutoZone has offered to stipulate to a video deposition of the corporate employee, has offered to stipulate to the deposition testimony of this witness in prior proceedings, and has

1 attempted to explore other available alternatives, all of which have been rejected by Plaintiff.
 2 Plaintiff will consider nothing less than requiring this person, who lives and works in Memphis,
 3 Tennessee, to appear in Oregon despite the known hardship to him.

4 **IV. RELEVANT FACTS**

5 **Plaintiff's Deposition Notice.**

6 On April 28, 2008, Plaintiff filed a 39C notice of deposition for a corporate representative
 7 (this was the second such notice, albeit on a different topic). *See*, Exhibit 1, Declaration of Tift. On
 8 May 2, as a result of a scheduling conflict, Plaintiff filed an amended notice, setting the deposition
 9 for May 30, 2008. *See*, Exhibit 2, Declaration of Tift. The notices, other than the date, are
 10 substantively identical.

11 In response to the first notice, counsel for AutoZone wrote to Mr. Powelson noting both a
 12 conflict with the date and objecting to the choice of location of this deposition, as the corporate
 13 representative appropriate for these inquiries lives and works in Tennessee. *See*, Exhibit 3,
 14 Declaration of Tift. Notably, Mr. Dessem's deposition had been taken by plaintiff's counsel, first as
 15 a "person most knowledgeable about payroll practices" and then as an individual in the *Joarnt v.*
 16 *AutoZone* matter. At that time, the deposition occurred in Tennessee. *See*, Ex. 4, Decl. of Tift. Mr.
 17 Dessem also was the person who represented AutoZone in a telephone discovery conference,
 18 ordered by the District Court in California in another matter filed by the Bailey Pinney firm against
 19 AutoZone. That conference was transcribed and is also available to the parties.

20 A series of emails followed the initial notice by AutoZone that it requested Mr. Dessem's
 21 deposition to take place in Tennessee, discussing the reasons that the deposition should occur in
 22 Tennessee, where the witness resides and where AutoZone's headquarters are located, and also
 23 noting that the practice, in regard to this witness, was to travel to his work location for deposition.
 24 *See*, Ex. 5, Decl. of Tift. AutoZone's counsel also contacted Mr. Dessem who explained that
 25 traveling to Portland was a hardship for him, due to his work responsibilities related to payroll for all
 26

1 of AutoZone. In effect, requiring Mr. Dessem to travel to Portland requires that he spend 3 days out
2 of the office—traveling for two days (because of the time difference) and being deposed.

3 The correspondence between the parties continued, *see*, Exs 6-8, culminating in a May 12,
4 2008 letter from Mr. Powelson stating, in part:

5 On May 15 and May 30, Plaintiff expects to depose one or more AutoZone designees *in the*
6 *State of Oregon* on all matters for which AutoZone is noticed to appear pursuant to ORCP
39C(6)...

7 More recently...you told me that AutoZone will not be moving for a protective order. If
8 Defendant fails to appear at deposition as noticed on ...May 30, be advised Plaintiff may be
forced to move the Court for relief.

9 *See*, Ex. 9 (emphasis in original). At this point, counsel for AutoZone called Mr. Powelson and
10 offered (1) to stipulate to a video or telephone deposition; and/or (2) to stipulate to Mr. Dessem's
11 prior testimony on the subjects listed in the deposition notice. All of these suggestions were
12 rejected. Counsel for AutoZone also pointed out the hardship to AutoZone should Mr. Dessem be
13 required to attend this deposition in Portland. Decl. of Tift.

14 **V. POINTS AND AUTHORITIES**

15 **A. Introduction.**

16 ORCP 36C provides in relevant part, that:

17 [F]or good cause shown, the court in which the action is pending may make any order which
18 justice requires to protect a party or person from annoyance, embarrassment, oppression, or
19 undue burden or expense, including one or more of the following: (1) that the discovery not
be had; (2) that the discovery may be had only on specified terms and conditions, including a
designation of the time or place...

20 Here, Plaintiff demands that a Tennessee resident appear for an Oregon deposition, despite
21 reasonable, less costly alternatives and hardship to the Deponent. AutoZone notes, in this regard,
22 that it has attempted to cooperate with Plaintiff's counsel in setting other 39C depositions, and
23 incurred the cost of flying a regional Human Resources Manager to Oregon from California
24 (recognizing that his work responsibilities did require him to, at least occasionally, be present in the
25 state). Given the record of this case, and Mr. Dessem's repeated testimony before these very
26

1 attorneys, AutoZone requests that the Court enter a protection order limiting the location of Mr.
 2 Dessem's deposition—either in person in Memphis Tennessee or as a video deposition.

3 **B. Legal Standard for Depositions of Corporate Representatives**

4 The general rule for setting the location of a corporate party's deposition is:

5 The deposition of a corporation by its agents and officers should ordinarily be taken at its
 6 principal place of business. This is subject to modification, however, when justice requires.
 7 An important question in determining where to hold the examination is the matter of
 8 expense. . . . The protective order rule..., [includes a provision to protect parties] from "undue
 burden or expense" as a ground for a protective order. . . . In each case in which a motion [for
 a protective order] is made the court considers the facts, selects the place of examination, and
 determines what justice requires...".

9 Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 2112 at 84-85 (1994 rev.) (footnotes
 10 omitted). Here, the factors mentioned by favor a deposition in Tennessee, or, at a minimum, a video
 11 deposition. The practice of the parties is to take Mr. Dessem's testimony in Tennessee—in fact, it
 12 had been done two times in that fashion. Mr. Dessem's work responsibilities all occur in Tennessee,
 13 and it is difficult for him to remove himself from those duties for the purpose of a deposition in
 14 Oregon. Further, the last time Mr. Dessem testified, his deposition lasted approximately two hours.
 15 His recorded statement in the California case took less time than that. It is unreasonable to require
 16 the travel time from Tennessee to Oregon for a deposition that will likely not last even half a day.

17 Plaintiff's counsel did not ever give a reason for declining a deposition in Tennessee, and has
 18 not given a reason for refusing to consider a video deposition, other than to say that he "doesn't like"
 19 to depose someone who is not "right in front of him."

20 ///

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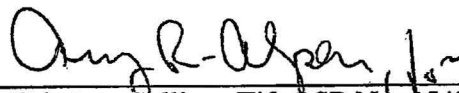
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1 **VI. CONCLUSION**

2 AutoZone respectfully requests that the Court enter a protective order limiting discovery in
3 this matter to the extent that either (1) the Dessem deposition take place in Tennessee, where Mr.
4 Dessem lives and works or (2) requires a video deposition of Mr. Dessem, which AutoZone has
5 already agreed to do.

6
7 Dated: May 22, 2008.

8 
9 _____
10 Leigh Ann Collings Tift OSB No. 054732
11 LITTLER MENDELSON
12 A Professional Corporation

13
14 Attorneys for Defendant
15 Autozone Inc.
16
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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2008, I served a full, true, and correct copy of the foregoing:

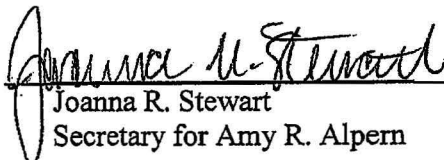
**DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND MEMORANDUM IN
SUPPORT THEREOF**

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By 
Joanna R. Stewart
Secretary for Amy R. Alpern

Firmwide:85216072.1 013306.2124

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

MOTION PRAECIPE

Notice is hereby given that Leigh Ann Collings Tift, of attorneys for defendant, has set a motion for hearing as follows:

Judge (or Pro Tem): **Hon. Jerome LaBarre**

Date: July 2, 2008 Time: 1:30 p.m. Room: 702

This is a ☒ first ☐ subsequent setting for this motion.

☐ moving party waives appearance ☒ reporting is requested (we will furnish our own court reporter for this hearing)

Length of time requested for this motion hearing: 15 minutes

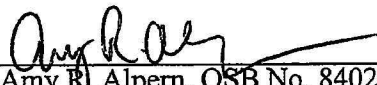
TYPE OF MOTION:

- | | | |
|--|--|--|
| <input type="checkbox"/> ORCP 21 | <input type="checkbox"/> Prima Facie Default | <input type="checkbox"/> Set Aside Default |
| <input type="checkbox"/> Summary Judgment | <input type="checkbox"/> Compel Production | <input type="checkbox"/> Change Venue |
| <input checked="" type="checkbox"/> Other: Defendant's Motion for Protective Order | | |

I certify that I served a copy of this praecipe by facsimile transmission on the 22nd day of May, 2008,
on the following:

Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683
Fax: 360-567-3331

Dated: May 22, 2008.



Amy R. Alpern, OSB No. 840244
Telephone (503) 221-0309

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE, INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DECLARATION OF LEIGH ANN
COLLINGS TIFT IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

I, Leigh Ann Collings Tift, hereby declare as follows:

1. I am one of the attorneys representing Defendant AutoZone, Inc. in the above-captioned matter, and I make this declaration in support of Defendant, AutoZone's, Motion for Protective Order. I have personal knowledge of the matters related herein.

2. Attached as **Exhibit 1** is a true and correct copy of Plaintiff's first ORCP 39C(6) Notice of Deposition of Defendant.

3. Attached as **Exhibit 2** is a true and correct copy of the First Amended ORCP 39C(6) Notice of Deposition of Defendant.

4. Attached as **Exhibit 3** is a true and correct copy of a letter dated April 29, 2008 from Ms. Tift to Mr. Powelson concerning both a conflict with the date selected for deposition and an objection to its location.

5. Attached as **Exhibit 4** is a true and correct copy of the Notice of Deposition for Mr. Mr. Dessem in the matter of Joarnt v. Autozone, Inc., Case No. 0503-02795. This notice was directed to Mr. Dessem as the "person most knowledgeable." Later, Plaintiff's noted Mr. Dessem's

1 deposition as an individual, and after that, did not pursue a deposition of the "person most
2 knowledgeable." Mr. Dessem's deposition in the Joarnt matter was taken in Tennessee.

3 6. Counsel is aware that Mr. Dessem's statement was taken in connection with his
4 responsibilities for AutoZone payroll operations in a California matter, as well. Mr. Dessem's
5 statement was recorded telephonically, and he remained in Tennessee.

6 7. Attached as **Exhibit 5** is a true and correct copy an email chain dated from April 03,
7 2008 to April 29, 2008, regarding the scheduling of the ORCP 39C(6) Deposition.

8 8. Attached as **Exhibit 6** is a true and correct copy of a letter dated May 2, 2008 from
9 Ms. Tift to Chey Powelson.

10 9. Attached as **Exhibit 7** is a true and correct copy of a letter dated May 2, 2008 from
11 Chey Powelson to Ms. Tift.

12 10. Attached as **Exhibit 8** is a true and correct copy of a letter dated May 8, 2008 from
13 Ms. Tift to Mr. Powelson.

14 11. Attached as **Exhibit 9** is a true and correct copy of a letter dated May 12, 2008 from
15 Mr. Powelson to Ms. Tift.

16 12. Upon receiving Mr. Powelson's May 12 letter, I conferred with him, on May 14, 2008
17 regarding a motion for a protective order, and with he and Mr. Bailey on May 16, 2008. I offered (1)
18 to stipulate to a video or telephone deposition; and/or (2) to stipulate to Mr. Dessem's prior
19 testimony on the subjects listed in the deposition notice. All of these suggestions were rejected. I
20 also pointed out the hardship to AutoZone should Mr. Dessem be required to attend this deposition
21 in Portland. I have spoken with Mr. Dessem, who indicates that traveling to Portland is a hardship
22 for him, due to his work responsibilities related to payroll for all of AutoZone. In effect, requiring
23 Mr. Dessem to travel to Portland requires that he spend 3 days out of the office—traveling for two
24 days (because of the time difference) and being deposed. Mr. Powelson indicated to me that he did
25 not believe that hardship to the deponent was a relevant consideration.
26

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2008, I served a full, true, and correct copy of the foregoing

DECLARATION OF LEIGH ANN COLLINGS TIFT

IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

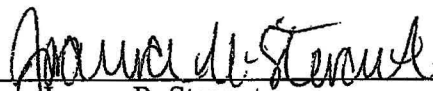
- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

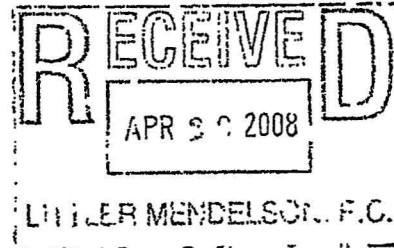
Of Attorneys for Plaintiff

By


Joanna R. Stewart
Secretary for Amy R. Alpern

Firmwide:85269326.1 013306.2124

Exhibit 1



**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, on behalf of himself and
all others similarly situated,

Plaintiffs,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

**ORCP 39C(6) NOTICE OF
DEPOSITION OF DEFENDANT**

TO: **AUTOZONE, INC.**, by and through your attorney, Ms. Leigh Ann Tift, One Union
Square, 600 University Street, Suite 3200, Seattle, WA 98101-3122

PLEASE TAKE NOTICE: that on **May 16, 2008**, commencing at **9:00 a.m.**, Plaintiff
will take the deposition of Defendant AutoZone, Inc., pursuant to ORCP 39C(6). The deposition
will be conducted at 1750 SW Harbor Way, Ste 450, Portland Oregon, or some other local
location if agreed upon in advance by the parties. The deposition will be recorded by a licensed
and qualified court reporter, and may additionally be recorded by audio/videotape.

Plaintiff requests examination relating to the following matters:

1. All AutoZone policies, procedures, and practices for processing and providing the
payment of final wages to all Oregon hourly employees whose employment
terminated in any manner with AutoZone between November 16, 2006 and
November 16, 2007. See e.g., Defendant's Bates Nos. AZ/MIGIS 0001212 -

ON
CAL

85048201

00001215; and AZ/MIGIS 0001656 - 1836 (and other related documents Defendant will presumably produce under the Court's order during the April 8, 2008 hearing on Plaintiff's *Motion to Enforce Court Order*).

2. All AutoZone efforts (such as training, seminars, orientation, review of any documents, and reminders or updates – such as memoranda in any form – created, reviewed or used by, or otherwise sent by or to AutoZone managers with actual or apparent authority over any aspect of AutoZone operations in the State of Oregon) to comply with Oregon State laws and regulations governing the payment of final wages to all Oregon hourly employees whose employment terminated in any manner with AutoZone between November 16, 2006 and November 16, 2007.
3. All performance-based financial incentive(s) and/or compensation AutoZone provided to Oregon Store, District, and/or Regional Manager(s).
4. All AutoZone termination information relating to Plaintiff Michael Migis, including all material facts relating to his termination from employment, the processing of his final wages, and issuance of his final paycheck.
5. How time worked by hourly AutoZone employees in the State of Oregon was tracked, recorded, transmitted, and otherwise computed, between April 1, 2005 and November 16, 2007.
6. All AutoZone policies, practices, and/or procedures relating to the review, adjustment or correction, and approval of Oregon hourly employee time records created between April 1, 2005 and November 16, 2007.
7. All AutoZone policies, practices, and/or procedures relating to the scheduling, tracking, and payment of overtime wages to hourly employees in the State of Oregon between April 1, 2005 and November 16, 2007.
8. All AutoZone policies, procedures, and/or practices relating to the scheduling and tracking of hourly employee rest periods in the State of Oregon between April 1,

2005 and November 16, 2007.

9. All AutoZone policies, procedures, and/or practices relating to the scheduling and tracking of hourly employee meal periods in the State of Oregon between April 1, 2005 and November 16, 2007.

10. The document(s) Bates-numbered AZ/MIGIS 0001220 - 1235, and AZ/MIGIS 0001253 - 1288, including the date(s) of creation, identity of all persons involved in the creation, review and/or modification of such document(s); and identification and meaning of all terms, fields, sources of data found therein.

11. The identification (including name and date) and purpose of all reports/queries AutoZone created or obtained from its electronic data relating to the compensation and hours worked by hourly AutoZone employees in the State of Oregon between April 1, 2005 and November 17, 2007.

NOTE: PURSUANT TO ORCP 39C(6), DEFENDANT'S HAS AN AFFIRMATIVE DUTY TO DESIGNATE, PREPARE AND PRODUCE THE PERSON(S) NEEDED TO TESTIFY AS TO THE TOPICS LISTED ABOVE. IF THE PERSON OR PERSONS PRODUCED DO NOT HAVE ADEQUATE KNOWLEDGE TO TESTIFY, PLAINTIFFS WILL SEEK APPROPRIATE REMEDIES, INCLUDING SANCTIONS.

Defendant should, by no later than five (5) business days prior to the date of this deposition, set forth for Plaintiff each person designated and the issue or issues on which such person will testify. The deposition will continue from hour to hour and day to day until complete.

SIGNED this 25th day of April 2008. BAILEY, PINNEY & ASSOCIATES, LLC


A.E. "BUD" BAILEY, OSB 87157
R. BRADLEY GRIFFIN, OSB 072390
CHEY POWELSON, OSB 03551
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

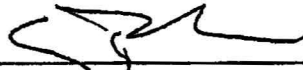
I hereby certify that I caused to be served the foregoing **ORCP 39C(6) Notice of Deposition of Defendant** upon:

Leigh Ann Tift
Littler Mendelson
One Union Square
600 University Street Suite 3200
Seattle WA 98101-3122

by the following indicated method or methods:

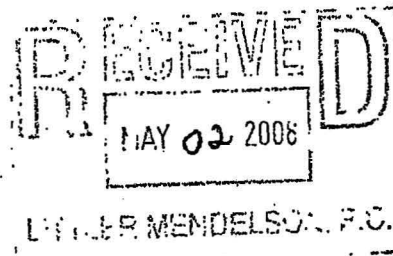
☒ by mailing a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on the date set-forth below.

DATED: April 25, 2008



CHEY POWELSON, OSB 03551
Of Attorneys for Plaintiff

Exhibit 2



WORKING COPY

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, on behalf of himself and
all others similarly situated,

Plaintiffs,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

FIRST AMENDED ORCP 39C(6)
NOTICE OF DEPOSITION OF
DEFENDANT

TO: AUTOZONE, INC., by and through your attorney, Ms. Leigh Ann Tift, One Union
Square, 600 University Street, Suite 3200, Seattle, WA 98101-3122

PLEASE TAKE NOTICE: that on Friday, May 30, 2008, commencing at 9:00 a.m.
PDT, Plaintiff will take the deposition of Defendant AutoZone, Inc., pursuant to ORCP 39C(6).
The deposition will be conducted at 1750 SW Harbor Way, Ste 450, Portland Oregon, or some
other local location if agreed upon in advance by the parties. The deposition will be recorded by
a licensed and qualified court reporter, and may additionally be recorded by audio/videotape.

Plaintiff requests examination relating to the following matters:

1. All AutoZone policies, procedures, and practices for processing and providing the
payment of final wages to all Oregon hourly employees whose employment
terminated in any manner with AutoZone between November 16, 2006 and
November 16, 2007. See e.g., Defendant's Bates Nos. AZ/MIGIS 0001212 -

00001215; and AZ/MIGIS 0001656 - 1836 (and other related documents Defendant will presumably produce under the Court's order during the April 8, 2008 hearing on Plaintiff's *Motion to Enforce Court Order*).

2. All AutoZone efforts (such as training, seminars, orientation, review of any documents, and reminders or updates – such as memoranda in any form – created, reviewed or used by, or otherwise sent by or to AutoZone managers with actual or apparent authority over any aspect of AutoZone operations in the State of Oregon) to comply with Oregon State laws and regulations governing the payment of final wages to all Oregon hourly employees whose employment terminated in any manner with AutoZone between November 16, 2006 and November 16, 2007.
3. All performance-based financial incentive(s) and/or compensation AutoZone provided to Oregon Store, District, and/or Regional Manager(s).
4. All AutoZone termination information relating to Plaintiff Michael Migis, including all material facts relating to his termination from employment, the processing of his final wages, and issuance of his final paycheck.
5. How time worked by hourly AutoZone employees in the State of Oregon was tracked, recorded, transmitted, and otherwise computed, between April 1, 2005 and November 16, 2007.
6. All AutoZone policies, practices, and/or procedures relating to the review, adjustment or correction, and approval of Oregon hourly employee time records created between April 1, 2005 and November 16, 2007.
7. All AutoZone policies, practices, and/or procedures relating to the scheduling, tracking, and payment of overtime wages to hourly employees in the State of Oregon between April 1, 2005 and November 16, 2007.
8. All AutoZone policies, procedures, and/or practices relating to the scheduling and tracking of hourly employee rest periods in the State of Oregon between April 1,

Page 2 -

FIRST AMENDED ORCP 39C(6) NOTICE OF DEPOSITION

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

1 2005 and November 16, 2007.

2 9. All AutoZone policies, procedures, and/or practices relating to the scheduling and
3 tracking of hourly employee meal periods in the State of Oregon between April 1,
4 2005 and November 16, 2007.

5 10. The document(s) Bates-numbered AZ/MIGIS 0001220 - 1235, and AZ/MIGIS
6 0001253 - 1288, including the date(s) of creation, identity of all persons involved in
7 the creation, review and/or modification of such document(s), and identification and
8 meaning of all terms, fields, sources of data found therein.

9 11. The identification (including name and date) and purpose of all reports/queries
10 AutoZone created or obtained from its electronic data relating to the compensation
11 and hours worked by hourly AutoZone employees in the State of Oregon between
12 April 1, 2005 and November 17, 2007.

13 **NOTE: PURSUANT TO ORCP 39C(6), DEFENDANT'S HAS AN AFFIRMATIVE DUTY TO**
14 **DESIGNATE, PREPARE AND PRODUCE THE PERSON(S) NEEDED TO TESTIFY AS TO**
15 **THE TOPICS LISTED ABOVE. IF THE PERSON OR PERSONS PRODUCED DO NOT**
16 **HAVE ADEQUATE KNOWLEDGE TO TESTIFY, PLAINTIFFS WILL SEEK**
17 **APPROPRIATE REMEDIES, INCLUDING SANCTIONS.**

18 Defendant should, by no later than five (5) business days prior to the date of this
19 deposition, set forth for Plaintiff each person designated and the issue or issues on which such
20 person will testify. The deposition will continue from hour to hour and day to day until complete.

21
22 SIGNED this 27th day of April 2008. BAILEY, PINNEY & ASSOCIATES, LLC

23
24 
25 A.E. "BUD" BAILEY, OSB 87157
26 R. BRADLEY GRIFFIN, OSB 072390
CHEY POWELSON, OSB 03551
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

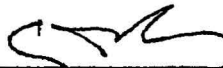
I hereby certify that I caused to be served Plaintiff's First Amended ORCP 39C(6) Notice of Deposition, dated April 29, 2008, upon:

Ms. Leigh Ann Tift
Counsel for Defendant AutoZone
Littler Mendelson
One Union Square, 600 University St, Ste 3200
Seattle, WA -98101

by the following indicated method or methods:

- ☒ by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on the date set-forth below.

DATED April 29, 2008



CHEY POWELSON, OSB 03551
Attorney for Plaintiff Migis

Exhibit 3

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April 29, 2008

Leigh Ann Tift
Direct: 206.381.4905
Direct Fax: 206.447.6965
ltift@littler.com

VIA MAIL AND FACSIMILE

Chey Powelson
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: *Migis v. AutoZone, Inc.*
Multnomah County Circuit Court Case No. 0711-13531

Dear Mr. Powelson:

I received your second ORCP 39 deposition notice. I am not available on May 16, and the corporate witness who has been designated is Mark Dessem, who is in Memphis. Please let me know when you want to reschedule this deposition, allowing for travel time.

Sincerely,


Leigh Ann Tift

cc: Tanya Holmes

Firmwide: 85056966.1 013306.2124

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85057839

Exhibit 4

JUL-22-2005 FRI 05:05 PM Bailey, Pinney & Assoc

FAX NO. 360 567 3331

P. 03/08

FILE

1
2
3 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
4 **FOR THE COUNTY OF MULTNOMAH**

5 **RICHARD JOARNT AND BERT**
6 **YAMAOKO**, individually, and on behalf of all
7 others similarly situated,

8 Plaintiffs,

9 v.

10 **AUTOZONE, INC.**, a Foreign Corporation,

11 Defendant.

No. 0503-02795

NOTICE OF DEPOSITION

12 **TO: AUTOZONE, INC.** by and through its attorney, Victor J. Kisch.

13 **PLEASE TAKE NOTICE:** that starting at 9:00 AM, on August 25, 2005, the
14 deposition of the person most knowledgeable, as defined below, will be conducted at the
15 offices of Tonkon Torp; 1600 Pioneer Tower; 888 SW Fifth Ave.; Portland, OR 97204. Said
16 deposition will be reported by court reporter and/or by audio/videotape. You are invited to
17 attend and cross-examine.

18 The "person most knowledgeable" is defined for the purposes of this notice as the
19 individual who has the most knowledge about Defendant's payroll and payment procedures,
20 in regards to employee paychecks. The person most knowledgeable should also know where
21 payroll is processed and how payroll calculations are made.

22 This notice shall be continued as to time and place upon stipulation of the parties.

23 DATED: July 22, 2005.

24 
25 **SHAUNA M. SJOSTROM**, OSB 04418
26 Attorney for Plaintiff

JUL-22-2005 FRI 05:05 PM Bailey, Pinney & Assoc

FAX NO. 360.567.3331

P. 04/08

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Notice of Deposition upon:

Victor J. Kisch
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Ave.
Portland, OR 97204

Fax No. 503-221-1440

by the following indicated method or methods:

☒ by mailing a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Vancouver, Washington on the date set-forth below.

☐ by faxing a full, true, and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed.

DATED: July 22, 2005


DAVID A. SCHUCK

Exhibit 5

Tift, Leigh Ann C.

From: Chey Powelson [cpowelson@wagelawyer.com]
Sent: Tuesday, April 29, 2008 4:45 PM
To: Tift, Leigh Ann C.
Cc: Alpern, Amy R.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: AutoZone/Migis
Attachments: Pltf 1st Amended ORCP 39C(6) Dep Ntc_04-29-08.pdf

Ms. Tift:

Thank you for the new dates. See the attached First Amended ORCP 39C(6) Notice for a deposition to take place in Portland, Oregon. I'll also e-mail this to you. Please also note this is in addition to the ORCP 39C(6) Notice of deposition set for May 15, 2008 in Portland, Oregon. It does not sound as though it would be overly burdensome for AutoZone to produce Mr. Dessem for deposition in Oregon, where Defendant operates well over 20 retail stores, and where there are important socio-economic issues at stake in this litigation (e.g., a foreign corporation's compliance with Oregon's wage and hour laws applicable to a large number of Oregon residents).

Chey Powelson

From: Tift, Leigh Ann C. [mailto:LTift@littler.com]
Sent: Tuesday, April 29, 2008 3:43 PM
To: Chey Powelson
Cc: Alpern, Amy R.; Bud Bailey
Subject: RE: AutoZone/Migis

Our witness is available on the 28th, 29th or 30th of May, in Memphis. Let me know which date works best for you.

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Tuesday, April 29, 2008 2:56 PM
To: Tift, Leigh Ann C.
Cc: Alpern, Amy R.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: AutoZone/Migis

I think we're still having a problem communicating about AutoZone's duty of designating witnesses.

Please keep in mind I never said you committed to producing a local witness as to the second ORCP 39C(6) Notice – I was referring you to our earlier discussion (and my follow up letter(s)) regarding the location: Plaintiff's position is that these depositions should occur in Oregon. Defendant's reference (in a letter of last week) to this office's "practice" from another case occurring over two years ago lacks persuasiveness.

If you're referring to the draft, stipulated protective order Defendant sent after 5:00 p.m. on Monday and then the next day informed Judge LaBarre we were refusing to sign it, please be advised I'm almost done drafting a proposed SPO you should soon receive. See also the attached Order from the W.D.Wash., which I think is important to set the context of our discussions on this matter.

5/14/2008

From: Tift, Leigh Ann C. [mailto:LTift@littler.com]
Sent: Tuesday, April 29, 2008 2:38 PM
To: Chey Powelson
Cc: Alpern, Amy R.
Subject: RE: AutoZone/Migis

Amy is selected as an arbitrator in another case on the 16th, Doug is working on something else and neither Jennifer nor Neil is sufficiently familiar with these facts. We're checking with our witness to find other dates that he is available. Also, just to clarify, this witness is in Memphis. I told you we could produce a local witness to respond to the first 39C request. I did not ever commit to a local witness on the topics referenced in the second 39C notice (which you served yesterday) and none is available. This deposition will have to take place in Memphis, and the logistics of a deposition in Portland on the 15th and a deposition in Memphis on the 16th are not workable.

On another subject, I would appreciate it if you would respond to our proposed protective order. You have had this document for more than a week. If you are not going to sign the order we prepared, please submit either a revised version or your own proposal. As Judge LaBarre mentioned, these are customary.

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Tuesday, April 29, 2008 11:30 AM
To: Tift, Leigh Ann C.
Subject: RE: AutoZone/Migis

Does your firm have other attorneys who could fill in, such as Mr. Parker, Mr. Olsen, Ms. Mora, or Ms. Alpern?

From: Tift, Leigh Ann C. [mailto:LTift@littler.com]
Sent: Tuesday, April 29, 2008 11:28 AM
To: Chey Powelson
Subject: RE: AutoZone/Migis

You and Neil talked about these depositions about a month ago. Since that time, I have a personal issue come up that will not allow me to attend a deposition on the 16th.

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Tuesday, April 29, 2008 11:14 AM
To: Tift, Leigh Ann C.
Cc: Alpern, Amy R.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: FW: AutoZone/Migis

Ms. Tift:

I've reviewed your faxed letter this morning indicating that Plaintiff's second ORCP 39C(6) deposition of AutoZone (primarily on payroll issues) cannot occur on May 16. I'm forwarding Mr. Olsen's prior e-mail for your convenience, in which Defendant already confirmed May 14 - 16 for these types of depositions. Plaintiff also expects the deposition to go forward as scheduled, and in Oregon as previously discussed.

Chey Powelson

5/14/2008

From: Olsen, Neil N. [mailto:NOlsen@littler.com]
Sent: Thursday, April 03, 2008 12:54 PM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: RE: AutoZone/Migis

Chey,

Yes, we are working diligently to compile responsive documents. Yes, we have conferred regarding you filing a motion to enforce the order.

Yes, I will provide you an update on other issues you raised.

Regarding depositions of AutoZone personnel, I do recall you mentioning your desire to take ORCP 39C(6) depositions. I think it is fine to pencil in May 14 to 16 for all of them, including the IT-type deposition (I assume most if not all will be in Memphis, so we will want to consolidate travel as I assume will you), but we will need you to describe with reasonable particularity the matters on which examination is requested so that we may determine the most appropriate designee. Perhaps draft notices would be appropriate. Once we determine the designee for each area, we can better nail down a schedule. Are Messrs. Dessem and Massey persons who you believe we will designate? We will need to work out the scope of the deposition regarding Affirmative Defenses.

Regarding Mr. Migis's deposition, we are willing to depose him after your ORCP 39C(6) depositions. How does May 20 or 21 look?

I will address your native format request by next week.

Best regards,
Neil

Neil N. Olsen
Littler Mendelson, P.C.
1750 SW Harbor Way, Ste. 450
Portland, OR 97201
Main: 503.221.0309
Direct: 503.889.8882
Cell: 503.807.8505
Fax: 503.242.2457
nolsen@littler.com

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Littler Mendelson, P.C.
<http://www.littler.com>

5/14/2008

Exhibit 6

LITTLER MENDELSON®
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May 2, 2008

Leigh Ann Tift
Direct: 206.381.4905
Direct Fax: 206.447.6965
ltift@littler.com

VIA FACSIMILE AND U.S. MAIL

Chey Powelson
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: *Migis v. AutoZone, Inc.*
Multnomah County Circuit Court Case No. 0711-13531

Dear Chey:

In response to your first letter of April 29, AutoZone will not stipulate to authenticity and admissibility of all documents exchanged in discovery. In response to your second letter of April 29, AutoZone will accept your proposed form of Stipulated Protective Order. Please prepare a final copy, send it to me, and I will sign it.

In response to your third letter of April 29 (and the correspondence that preceded it), please be advised that AutoZone will produce a local witness to testify to the subjects listed in the first notice on May 15—because there is a regional HR person who is qualified to do so, and who worked, at least in part, in Oregon. In response to your second notice, however, there is no one local who is qualified to testify to these subjects. I have told you this before, and also told you that AutoZone will produce a witness to testify on those subjects in Memphis, where the witness lives and works. If you want to take a telephone deposition, that is fine with me, but there is no one present in Oregon who can respond to the subjects set out in the second 39C notice, and simply sending another subpoena with a Portland location will not change the fact that all of AutoZone's payroll functions are centered in Memphis or the witness' place of residence. Please let me know as soon as possible if we need to continue to hold time on our Memphis witness' calendar for May 30.

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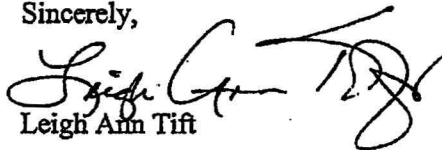
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Chey Powelson
May 2, 2008
Page 2

Sincerely,


Leigh Ann Tift

LAT:sls

cc: Tanya Holmes
Jennifer Mora

Firmwide:85096427,1 013306.2124

Exhibit 7

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law

1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

CHEY POWELSON

Telephone (360) 567-2551

Facsimile (360) 567-3331

e-mail: CPowelson@wagelawyer.com

* Washington License WSBA 34593

* Oregon License OSB 03551

May 2, 2008

VIA E-MAIL ONLY

Ms. Leigh Ann Tift

ltift@littler.com

One Union Square

600 University St, Ste 3200

Seattle, WA 98101-3122

**Re: *Migis v. AutoZone, Inc.* (Multnomah Co. Circuit Court No. 0711-13531)
Defendant's May 2 Letter Regarding ORCP 39C(6) Designee Location**

Ms. Tift:

I reviewed your letter of today. Defendant still appears to be under the impression it must produce one or more ORCP 39C(6) designees who are "qualified" to testify (based on their personal knowledge) on the issues noticed, which means Plaintiff must travel to Memphis where the designee(s) reside.

Be advised that, and consistent with my earlier representations, Plaintiff still expects to depose AutoZone on all ORCP 39C(6) issues in the State of Oregon, not Tennessee, at the dates and times noticed. AutoZone operates over 20 stores in the State of Oregon. During the claims period at issue in this lawsuit employed hundreds of Oregon residents.

Moreover, as you know, when determining the location of depositions such as these, one of the critical factors courts consider is the likelihood that disputes between the parties will arise during the deposition.

The way this case has proceeded up to this point, including Defendant's refusal to stipulate to even the most routine matters, foreshadows less-than-agreeable ORCP 39C(6) depositions.

The depositions should occur in Oregon. This will facilitate more efficient (expedient) resolutions to any problems that arise.

Sincerely,

/s/

Chey K. Powelson
Attorney for Plaintiff

Exhibit 8

LITTLER MENDELSON®
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May 8, 2008

Leigh Ann Tift
Direct: 206.381.4905
Direct Fax: 206.447.6965
ltift@littler.com

VIA MAIL AND FACSIMILE

Chey Powelson
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: *Migis v. AutoZone, Inc.*
Multnomah County Circuit Court Case No. 0711-13531

Dear Mr. Powelson:

This is in response to your most recent letter regarding the second 39C deposition notice and our discovery conference this morning. In your letter of May 2, 2008 regarding the location of the 39C deposition, you state: "Defendant still appears to be under the impression that it must produce one or more ORCP 39C(6) designees who are 'qualified' to testify based upon their personal knowledge [in response to these notices]."

We do not believe that the witnesses need to testify on the basis of personal knowledge. I am well aware that corporate knowledge of a witness will suffice for this purpose. I am also well aware of the requirement that the corporation produce the most qualified person to testify on its behalf. *See, Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 798 (9th Cir. 2003); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 17 (1st Cir. 2000) (corporation must identify person who best speaks for it on 30(b)(6) subjects). As I have explained to you numerous times, AutoZone's payroll employees, and specifically the person knowledgeable about the subjects you identify in your deposition notice, all live and work in Memphis. None are resident in the state of Oregon. AutoZone cannot teach its store managers or area managers in Oregon an area entirely outside their job responsibilities and then designate them as a person best able to speak to AutoZone payroll policies and programs and will not do so. The second 39C designee will be available for deposition in Memphis. If you want to take a telephone or video deposition, that is acceptable to us.

You asked about the designee for the first 39C deposition and whether that person will be prepared to speak to all subjects in the notice—you specifically mentioned AutoZone's defense of laches, and your contention that the company must produce a fact witness to show that it was materially harmed by delay. I maintain that most of what you spoke of is legal theory, or application of law to facts, but to the extent that the witness can testify without

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88156095

Chey Powelson
May 8, 2008
Page 2

disclosing attorney client communications or work product, we will produce an appropriate witness next week.

With respect to the lengthy discovery conference this morning, lasting more than 1 1/2 hours, please note that I have offered to look at documents you designate to see if we will stipulate to their authenticity. You indicate you feel you should not have to spend the time identifying these documents, but did, eventually, ask that I review Bates-labeled documents AZ/Migis 282-294 and something you called the "Q-2 earnings report." I've looked at Bates labeled documents AZ/Migis 282-294, and we will stipulate that these documents, and any others that are titled "Employee 200_ [inserting the noted year and quarter] Earnings Record" are what they purport to be—that is, a report of an employee's earnings by quarter. You asked that I also stipulate that "everything like them" is authentic. I'm not able to enter into such a stipulation, but if you want to identify documents, or even Bates ranges, I will, as I said, look at them and give you our answer.

You asked that AutoZone produce all of Mr. Migis' work schedules. As I think you know, from the previous case, AutoZone managers do not always retain work schedules. A work schedule is a plan—it does not represent the actual hours worked. AutoZone does keep proper records of hours worked, but does not necessarily keep work schedules. I believe you have what there is to produce in regard to Mr. Migis' past work schedules, but if there are schedules that are located as this case progresses, we will produce them. The same is true for any other documents that are located and are responsive to discovery requests.

You asked for an electronic copy of the lunch variance report we sent you in hard copy. I will have a disk sent to you.

You asked me to send a corrected copy of my declaration in support of our opposition to the motion for attorney fees. If I mistakenly attributed a conversation to the wrong day, I will make sure the court is aware of the mistake.

You suggested that AutoZone did not produce all emails relative to your RFP # 2 because, you posit, AutoZone managers "must be emailing" one another "all the time" about wage and hour matters. I told you I'd seen nothing that would lead me to believe that was true. You also seem to forget that this Request does not ask about emails about "wage and hour matters," it is much more specific than that. You asked me if I include all HR managers when I said I had not seen anything that led me to believe your hypothesis was correct, and I responded, and want to reiterate, that we are talking about specific discovery requests, not my personal opinions—or yours—about the content of email traffic within AutoZone.


You suggested that AutoZone had not complied with its obligation to provide Plaintiff with a "weekly summarization of hours" in response to RFP No. 4. AutoZone provided Plaintiff with exactly what was requested.

Chey Powelson
May 8, 2008
Page 3

We had an extended discussion about Plaintiff's demand for every time record for every employee employed by AutoZone in Oregon for the one year period preceding the filing of the Migis complaint. You initially asked if AutoZone would stipulate to class certification. We will not. Next, you suggested that you would agree to accept 1 out of every 5th employee's records, if I would stipulate that that sample was representative. I asked if you would also stipulate that those records were representative, which you declined to do. You then changed your mind and said you would accept 1 out of every 3rd employee's records if I would stipulate that the records were representative, but again declined to do so on behalf of Plaintiff. Next you said you might consider that stipulation if I would agree you could depose the person who randomly selected the employee's whose records were produced. Ultimately, you changed your mind about that, too, and said you intended to move to compel all time records for all employees.

Finally, I am compelled to address the conclusion of our conversation. I felt that the conversation degenerated into comments that were completely unprofessional and sometimes bizarre (the "metaphysical truth" part, for example). I would appreciate it if you would refrain from this kind of conversation in the future. I think that these discovery conference should be much briefer and more to the point.

Sincerely,


Leigh Ann Tift

cc: Tanya Holmes
Amy Alpern

Exhibit 9

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law

1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

CHEY POWELSON

Telephone (360) 567-2551
Facsimile (360) 567-3331
e-mail: CPowelson@wagelawyer.com

• Washington License WSBA 34593
• Oregon License OSB 03551

May 12, 2008

VIA E-MAIL & FAX: (206) 447 - 6965

Ms. Leigh Ann Tift

ltift@littler.com

One Union Square

600 University St, Ste 3200

Seattle, WA 98101-3122

Re: Migis v. AutoZone, Inc. (Multnomah Co. Circuit Court No. 0711-13531)
ORCP 39C(6) Issues

Ms. Tift:

This letter is (a) in response to your May 8, 2008 letter and (b) to reiterate Plaintiff's position as set forth in prior letters to you and during our phone conversations on the matter.

On May 15 and May 30, Plaintiff expects to depose one or more AutoZone designees *in the State of Oregon* on all matters for which AutoZone is noticed to appear pursuant to ORCP 39C(6).

Some time ago you informed me AutoZone would be moving for a protective order on the issue of Plaintiff's April 10, 2008 39C(6) notice for deposition on May 15.

More recently (and in response to my inquiry during a telephonic discovery conference), however, you told me that AutoZone will *not* be moving for a protective order.

If Defendant fails to appear at deposition as noticed on May 15 and May 30, be advised Plaintiff may be forced to move the Court for relief. See e.g., ORCP 46D; *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275 (3rd Cir. 2000); *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196 (5th Cir. 1993); *Ferko v. NASCAR*, 218 F.R.D. 125 (E.D.Tx. 2003), and *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168 (D.D.C. 2003).

Sincerely,

/s/

Chey K. Powelson
Attorney for Plaintiff

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May 22, 2008

VIA MESSENGER

Civil Clerk
 Multnomah County Circuit Court
 1021 SW Fourth Avenue
 Portland, OR 97204

Re: *Michael Migis v. AutoZone, Inc.*
 Multnomah County Circuit Court Case No. 0711-13531

Dear Clerk:

Enclosed for filing in the above-referenced matter are:

1. Defendant's Motion for Protective Order and Memorandum in Support Thereof (oral argument requested);
2. Declaration of Leigh Ann Collings Tift in Support of Defendant's Motion for Protective Order and Memorandum in Support Thereof (with attached exhibits);
3. Defendant's Motion for Partial Judgment on the Pleadings and Statement of Points and Authorities in Support (oral argument requested) (with attachment).

Both motions have been praeciped and will be heard by the Honorable Jerome E. LaBarre on July 2, 2008 at 1:30 p.m.

Also enclosed are postage-prepaid postcards that I would appreciate you filling out and returning to us when the above motions have been filed. Please call me if you have any questions.

Very truly yours,

LITTLER MENDELSON



Amy R. Alpern

ARA/jrs

Enclosures

cc: Honorable Jerome E. LaBarre (w/enclosures, via messenger)
 A.E. "Bud" Bailey (w/enclosures, via facsimile)
 Chey Powelson (w/enclosures, via facsimile)

Firmwide: 85285946.1 013306.2124

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RECEIVED

MAY 22 2008

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

Case No. 0711-13531

MOTION PRAECIPE

Notice is hereby given that attorneys for Plaintiff has set a motion for hearing as follows:

Judge: The Hon. Jerome LaBarre	Room: 702
Date: July 2, 2008	Time: 1:30 p.m.

On Call _____ for _____ in Room 208 at 9:00 a.m.

This is a _____ first _____ subsequent setting.

Length of time requested for this motion hearing: 30 minutes


☐ Moving party waives appearance.

☐ Reporting is requested.

☐ Hearing by telephone is requested.


(Fee is required when motion is filed)

Type of Motion: Supplemental Briefing on Plaintiff's Motion to Enforce Court Order

I certify that I caused to be served a copy of this Praecipe by  Hand Delivery as required by SLR 5.015 on the opposing party as follows:

Ms. Amy Alpern
Littler Mendelson
1750 SW Harbor Way, Ste. 450
Portland, OR 97201

DATED May 22, 2008.


CHEY POWELSON, OSB 03551
Of Attorneys for Plaintiff

RECEIVED

MAY 22 2008

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

Case No. 0711-13531

STATEMENT OF ATTORNEYS' FEES
AND COSTS BILL FOR PLAINTIFF

JUDGE JEROME LaBARRE

STATE OF WASHINGTON)
County of Clark) ss.

The undersigned attorney represents to the Court that, under penalty of perjury and upon information and belief, the following facts offered in support of an award of reasonable expenses, including attorneys' fees, are true based on the information available:

1. Pursuant to this Court's oral order on April 22, 2008 that Plaintiff be awarded expenses relating to Defendant's *Motion for Extension of Time (Exhibit 1, attached hearing transcript (pp. 20:25 - 21:12))* to this Court's Second Order on Plaintiff's *First Motion for Order Compelling Discovery*, the Plaintiff is entitled to a sum for reasonable expenses, including attorneys' fees, necessarily incurred. See also ORCP 46B.

///

2. The number of hours and services rendered relating to Defendant's *Motion for Extension of Timer* for each attorney and associate attorney and the hourly rates for each are set forth in detail in **Exhibit 2** (as modified by Plaintiff's attorney on May 21, 2008 and hand-delivered to Defendant's counsel), attached hereto. Plaintiff's counsel mailed a prior, unmodified version of Exhibit 2 to Defendant on or about April 25, 2008, and to which Defendant objected. Attached as **Exhibit 3** is Plaintiff's letter to Defendant's counsel, requesting that Defendant's counsel correct her declaration supporting Defendant's Objection to Plaintiff's billing statements (unmodified version of Exhibit 2) because the declaration appeared to set forth inadvertent, incorrect information. **Exhibit 2** is summarized as follows:

<u>NAME</u>	<u>HOURLY RATE</u>	<u>HOURS</u>	<u>FEES</u>
A.E. "Bud" Bailey (AEB)	\$495.00	8.30	\$4,108.50
J. Dana Pinney (JDP)	\$495.00	0.50	\$247.50
Chey K. Powelson (CPow)	\$250.00	16.00	\$4,000.00
R. Bradley Griffin (BG)	\$250.00	0.80	\$200.00
<u>Karen A. Moore (KMo)</u>	<u>\$250.00</u>	<u>0.30</u>	<u>\$75.00</u>
Total Attorneys' Fees:			\$8,631.00

3. The following charges, as reflected in **Exhibits 4 and 5** (also sent via mail on April 25 to Defendant's counsel), are reasonable and necessary and are not included in the hourly rate set forth above.

Process Services	\$ 25.00
	<u>\$ 20.00</u>
Total Costs	\$ 45.00

///


///

///

1 4. Based on the above, Plaintiff Migis as Petitioner is entitled to an award for
2 reasonable and necessary attorneys' fees of **8,631.00**, and for costs of **\$45.00**.
3

4
5
6
7 DATED this 22nd day of May 2008.

BAILEY, PINNEY & ASSOCIATES, LLC

8
9 
10 CHEY POWELSON, OSB 035512
11 Attorney for Plaintiff

12 Subscribed and sworn to before me today, this 22 day of May 2008.




Notary Public for Washington
My Commission Expires: 11.19.2010

Declaration of Chey Powelson in
Support of Attorneys' Fees and Costs
Bill for Plaintiff

FILED

06 MAY 22 PM 4:55

CLERK OF COURT
FOR MULTNOMAH COUNTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

No. 0711-13531

DECLARATION OF CHEY K.
POWELSON IN SUPPORT OF
PLAINTIFF'S REQUEST FOR
ATTORNEY FEES

ENTERED

MAY 28 2008

IN REGISTER BY SL

I, Chey K. Powelson, hereby declare:

1. I am one of the attorneys for Plaintiff herein.
2. I make this declaration upon personal knowledge and in support of Plaintiff's Petition for Award of Attorney Fees.
3. I am an associate attorney at Bailey, Pinney & Associates, LLC and have practiced at the firm since January 2008.
4. I graduated from Gonzaga University School of Law in 2002 and also obtained a Master's degree in Business Administration from Gonzaga University in 2004.
5. I am admitted to practice law in the State of Oregon, the State of Washington, and the United States District Court of Western and Eastern Districts of Washington.
6. Bailey Pinney & Associates limits its practice (with minor exceptions) to employment litigation emphasizing wage and hour law.
7. Bailey Pinney & Associates was retained by Plaintiff on a contingency basis. I recorded hours I worked on the case, but the firm is only entitled to payment of its attorney

1 fees should Plaintiff prevail.

2 8. Cases are accepted by this firm based upon the belief that a defendant has
3 violated some statutory employment protection law, not based upon the size of the underlying
4 claim. I consider my representation in such cases to be a matter of social and public benefit in
5 redressing violations of statutory employment laws.

6 9. The fact that Plaintiff's claims were small makes an award of a full measure of
7 damages all the more imperative. Statutory purposes can only be effected by an award of the
8 full amount of attorneys' fees to encourage an attorney to prosecute the small yet difficult
9 cases.

10 10. Plaintiff's petition for attorney fees details the time required in the prosecution
11 of this case.

12 11. Most of my hours recorded on this petition were entered on a daily basis
13 contemporaneously with the activity performed. Some hours were recorded reasonably soon
14 thereafter and while the time expended was still fresh in my memory. Time records are
15 entered directly into the computer system via time sheets for all matters for all clients.

16 12. All my hours claimed in the Fee petition supported by this declaration were
17 necessary and reasonable in the prosecution of this case.

18
19 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE
20 BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
21 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

22 Dated May 22, 2008.

23
24
25
26



CHEY K. POWELSON OSB 035512
Of Attorneys for Plaintiffs

Declaration of A.E. Bud Bailey in
Support of Attorneys' Fees and Costs
Bill for Plaintiff

FILED
08 MAY 22 PM 4:55

JIT COURT
FOR MULTNOMAH COUNTY

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly situated,

Plaintiff,

No. 0711-13531

**DECLARATION OF A.E. BUD
BAILEY IN SUPPORT OF
PLAINTIFF'S REQUEST FOR
ATTORNEY FEES**

v.

AUTOZONE, INC.,

Defendant.

ENTERED

MAY 28 2008

I, A.E. Bud Bailey, hereby declare:

1. I am a senior attorney and member in ~~BAILEY, PINNEY & ASSOCIATES, LLC~~ of
attorneys for Plaintiff, and was one of the primary attorneys responsible for representing
Plaintiff in this matter.

2. I make this Declaration upon personal knowledge and in support of
Plaintiff's Petition for Attorneys' Fees.

3. I am admitted to practice in the State and Federal Courts of Oregon and the
State Courts of Washington. I have been engaged in the practice of law since my admission
to the Oregon Bar in 1987. My practice is limited to employment law, and emphasizes wage
and hour.

4. Since 1999, I have been a principal member in the firm of Bailey, Pinney &
Associates, LLC, which limits its practice (with minor exceptions) to employment litigation,
involving employment contracts and wage and hour law.

REASONABLENESS OF HOURLY RATE

5. Familiarity with Rates within Relevant Area. I am familiar with the fees charged by attorneys in the Portland metropolitan area and attorneys' hourly rates charged to clients and rates awarded by the Courts in this area.

6. Established Market Rate. I have an established rate for my services. My rate is comparable to defense attorneys of comparable skill and experience who practice in this area of the law and who appear opposite me in litigation of these cases.

7. Within Range of Prevailing Market Rate. My hourly rate is within the range of the prevailing market rate for an attorney with similar legal experience performing work on an hourly basis in a specialized area of law.

8. Contingency Basis. I was retained in this case on a contingency basis. I have endeavored to provide services to civil rights and wage and hour claimants even if they do not have the ability to pay an hourly rate. I can, and will continue to do this, only as long as I have the expectation that upon the successful conclusion of the case, I am paid the market value for my services.

9. When I accept cases such as this one, I do so without controlling regard to the amount of damages or amount of anticipated recovery. My decision of whether to accept the case is whether or not I am convinced a violation of statutory employment protection laws has occurred. I consider my representation in such cases to be a matter of social and public benefit in redressing violations of statutory employment laws, such that the precise amount of recovery a case presents is secondary

10. The fact Plaintiff's claims here were small makes an award of a full measure of damages all the more imperative. Statutory purposes can only be affected by an award of the full amount of attorneys' fees to encourage an attorney to prosecute the small yet difficult cases.

1 11. Despite my desire to work toward the protection of the statutory rights of
 2 employees, I am able to continue to handle the cases only if the Court awards fees comparable
 3 to what the firm could have earned by working at its usual hourly rates. In fact, in contingent
 4 cases, I expect to make substantially more than my hourly rate.

5 HOURS WORKED


6 12. Plaintiff's Petition for Attorneys' Fees details the time required in the
 7 prosecution of this case.

8 13. All hours included on the Petition for Attorneys' Fees are recorded on a daily
 9 basis contemporaneously with the activity performed. Time records are entered directly into
 10 the computer system via time sheets for all matters for all clients each day. The time sheets
 11 are then electronically transferred to the billing program at regular intervals. The statement of
 12 time was generated by the PC Law legal billing computer program for Bailey Pinney and
 13 Associates. I have reviewed the hours for accuracy and reasonableness.

14 14. The hours claims in the Fee Petition supported by this Declaration are
 15 reasonably incurred and necessary to the action, and the hourly rates are reasonable.

16
 17 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE
 18 BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
 19 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

20 Dated May 22, 2008.

21
 22
 23 
 24 A. E. BUD BAILEY, OSB 87157
 25 Of Attorneys for Plaintiff
 26

Declaration of James D. Pinney in
Support of Attorneys' Fees and Costs
Bill for Plaintiff

FILED

08 MAY 22 PM 4:55

CIRCUIT COURT
FOR MULTNOMAH COUNTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly situated,

Plaintiff,

No. 0711-13531

**DECLARATION OF J. DANA
PINNEY IN SUPPORT OF
PLAINTIFF'S REQUEST FOR
ATTORNEY FEES**

AUTOZONE, INC.,

Defendant.

ENTERED

MAY 28 2008

IN REGISTER BY SL

I, J. Dana Pinney, hereby declare:

1. I am the managing member of the law firm of Bailey, Pinney & Associates, LLC, of attorneys for Plaintiff, and was one of the primary attorneys representing Plaintiff in this matter.

2. I make this declaration upon personal knowledge and in support of the Plaintiff's Petition for Attorney Fees. I am familiar with the facts averred to herein, and if called to testify regarding these facts, I could and would do so competently.

3. I am admitted to practice in the State and Federal Courts of Oregon, Washington, and Washington D.C. I have been engaged in the practice of law since my admission to the Oregon Bar in 1975. Since its founding in 1999, I have been a principal member in the law firm of Bailey, Pinney and Associates LLC, practicing in Oregon and Washington States and Bailey, Pinney and Associates, LLC has limited its practice to wage and hour employment law (with minor exceptions).

4. The Bailey Pinney and Associates law firm has actively pursued cases to effect the purposes of wage protection statutes, for the prompt payment of final wages, overtime and

1 minimum wages. The Bailey Pinney and Associates law firm, has successfully litigated over
 2 700 individual wage claims and has successfully prosecuted appeals of several cases to the
 3 Oregon Court of Appeals and two case to the Oregon Supreme Court.

4 The Oregon Supreme Court cases include: *Joarnt v. AutoZone* 2007 Or. Lexis 768;
 5 *Smoldt v. Henkles & McCoy*, 334 Or. 507, 53 P3d 443 (2002); *Taylor v. Werner Enterprises*,
 6 329 Or 461, 988 P.2d 384 (1999).

7 The Oregon Court of Appeals cases include: *Mantia v. Hanson*, 190 Or App 412
 8 (2003); *Aguirre v. Albertsons Inc.*, 201 Or App 31 (2005); *Wales v. Walt Stallcup Enterprises*,
 9 167 Or App 212, (2000); *Vento v. Versatile Logic Systems Corp.*, 167 Or App 272, 3 P.3d 176
 10 (2000); *Hurger v. Hyatt Lake Resort*, 170 Or App 320, 13 P.3d 123 (2000).

11 5. The Bailey Pinney and Associates law firm has actively pursued cases to
 12 implement the overtime and minimum wage requirements of the Fair Labor Standards Act
 13 both in State and Federal Courts. Notable Oregon United States District Court cases include:
 14 *Ballaris v. Wacker Siltronics*, U.S. District Court of Oregon, Civil No. 00-1627-KI; *Allen v.*
 15 *WTD Industries, Inc.*, 99-249-RE, a class action involving the interplay between Oregon
 16 overtime penalty wages and the FLSA liquidated damages; *Hargrove v. Sykes Enterprises*
 17 *Inc.*, CV99-110-HA; *Thompson v. Astro Western Stations Inc.*, 98 855-KI; *Davis v. Maxim*,
 18 98-1258-HU; and *Fix v. Sutton Motors*, 98-6343-HU.

19 6. Important wage and hour case decisions prosecuted by the Bailey Pinney and
 20 Associates law firm to the 9th Circuit Court of Appeals include: *Ballaris v. Wacker Siltronic*
 21 370 F.3d 901 (9th Cir. 2004); *Gieg v. Howarth* 244 F.3d 775 (9th Cir 2001); and *Trina*
 22 *Richardson v. Sunset Science Park Union*, 268 F.3d 654 (9th Cir. 2001).

23 REASONABLENESS OF HOURLY RATE

24 7. Familiarity with Rates within Relevant Area. I am familiar with the fees
 25 charged by attorneys throughout Oregon and the attorneys' hourly rates charged to clients and
 26 rates awarded by the Courts in this area of law.

1 8. **Established Market Rate.** I have an established rate for my services. My rate
 2 is based on rates charged in the community by lawyers of reasonably comparable skill,
 3 experience, reputation and who practices in this and similar specialty areas.

4 9. **Within Range of Prevailing Market Rate.** My hourly rate is within the range
 5 of the prevailing market rate for an attorney with similar legal experience performing work on
 6 an hourly basis in a specialized area of law.

7 HOURS WORKED

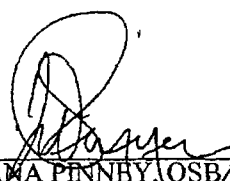
8 10. Plaintiff's Petition for Attorneys' Fees details the time required in the
 9 prosecution of this case.

10 11. Most of my hours recorded on this petition were entered on a daily basis
 11 contemporaneously with the activity performed. Some hours were recorded reasonably soon
 12 thereafter and while the time expended was still fresh in my memory. Time records are
 13 entered directly into the computer system via time sheets for all matters for all clients. The
 14 statement of time was generated by the PC Law legal billing computer program for Bailey
 15 Pinney and Associates. I have reviewed my hours for accuracy and reasonableness.

16 12. The hours claimed in the Fee Petition supported by this Declaration are
 17 reasonably incurred and necessary to the action, and the hourly rates are reasonable.

18
 19 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE
 20 BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
 21 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

22 Dated May 22, 2008.

23
 24
 25 
 26 J. DANA PINNEY, OSB 75308
 Of Attorneys for Plaintiff

13

Declaration of R. Bradley Griffin in
Support of Attorneys' Fees and Costs
Bill for Plaintiff

FILED

08 MAY 22 PM 4:55

CIRCUIT COURT
FOR MULTNOMAH COUNTY

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

No. 0711-13531

**DECLARATION OF R. BRADLEY
GRIFFIN IN SUPPORT OF
PLAINTIFF'S REQUEST FOR
ATTORNEY FEES**

ENTERED

MAY 28 2008

IN REGISTER BY SL

I, R. Bradley Griffin, hereby declare:

1. I am one of the attorneys for Plaintiff herein.
2. I make this declaration upon personal knowledge and in support of Plaintiff's
Petition for Award of Attorney Fees.
3. I am an associate attorney at Bailey, Pinney & Associates, LLC and have
practiced at the firm since November 2007.
4. I graduated from Washington University School of Law in 2005.
5. I am admitted to practice law in the State of Oregon, the State of Missouri, and
the United States District Court of Oregon.
6. Bailey Pinney & Associates limits its practice (with minor exceptions) to
employment litigation emphasizing wage and hour law.
7. Bailey Pinney & Associates was retained by Plaintiff on a contingency basis. I
recorded hours I worked on the case, but the firm is only entitled to payment of its attorney
fees should Plaintiff prevail.

1 8. Cases are accepted by this firm based upon the belief that a defendant has
2 violated some statutory employment protection law, not based upon the size of the underlying
3 claim. I consider my representation in such cases to be a matter of social and public benefit in
4 redressing violations of statutory employment laws.

5 9. The fact that Plaintiff's claims were small makes an award of a full measure of
6 damages all the more imperative. Statutory purposes can only be effected by an award of the
7 full amount of attorneys' fees to encourage an attorney to prosecute the small yet difficult
8 cases.

9 10. Plaintiff's petition for attorney fees details the time required in the prosecution
10 of this case.

11 11. Most of my hours recorded on this petition were entered on a daily basis
12 contemporaneously with the activity performed. Some hours were recorded reasonably soon
13 thereafter and while the time expended was still fresh in my memory. Time records are
14 entered directly into the computer system via time sheets for all matters for all clients.

15 12. All my hours claimed in the Fee petition supported by this declaration were
16 necessary and reasonable in the prosecution of this case.

17
18 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE
19 BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
20 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

21 Dated May 22, 2008.

22
23
24 
25 R. BRADLEY GRIFFIN OSB 072390
26 Of Attorneys for Plaintiffs

Declaration of Karen A. Moore in
Support of Attorneys' Fees and Costs
Bill for Plaintiff

* FILED

08 MAY 22 PM 4:55

CLERK OF COURT
FOR MULTNOMAH COUNTY

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

No. 0711-13531

**DECLARATION OF KAREN A.
MOORE IN SUPPORT OF
PLAINTIFF'S REQUEST FOR
ATTORNEY FEES**

ENTERED

MAY 28 2008

IN REGISTER BY SL

I, Karen A. Moore, hereby declare:

1. I am one of the attorneys for Plaintiff herein.
2. I make this declaration upon personal knowledge and in support of Plaintiff's Request for Attorney Fees.
3. I am an associate attorney at Bailey, Pinney & Associates, LLC and have practiced at the firm since July 2004.
4. I graduated from Northwestern School of Law, Lewis and Clark College in 2003.
5. I am admitted to practice law in the State of Oregon and the United States District of Oregon.
6. Bailey Pinney & Associates limits its practice (with minor exceptions) to employment litigation emphasizing wage and hour law.
7. Bailey Pinney & Associates was retained by Plaintiff on a contingency basis. I recorded hours I worked on the case, but the firm is only entitled to payment of its attorney

1 fees should it prevail.

2 8. Cases are accepted by this firm based upon the belief that a defendant has
3 violated some statutory employment protection law, not based upon the size of the underlying
4 claim. I consider my representation in such cases to be a matter of social and public benefit in
5 redressing violations of statutory employment laws.

6 9. The fact that Plaintiff's claims were small makes an award of a full measure of
7 damages all the more imperative. Statutory purposes can only be effected by an award of the
8 full amount of attorneys' fees to encourage an attorney to prosecute the small yet difficult
9 cases.


10 10. Plaintiff's petition for attorney fees details the time required in the prosecution
11 of this case.

12 11. Most of my hours recorded on this petition were entered on a daily basis
13 contemporaneously with the activity performed. Some hours were recorded reasonably soon
14 thereafter and while the time expended was still fresh in my memory. Time records are
15 entered directly into the computer system via time sheets for all matters for all clients.

16 12. All my hours claimed in the Fee petition supported by this declaration were
17 necessary and reasonable in the prosecution of this case.

18
19 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE
20 BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
21 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

22 Dated May 22, 2008.

23
24 
25 KAREN A. MOORE OSB 040922
26 Of Attorneys for Plaintiffs

RECEIVED

MAY 29 2008

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,
and on behalf of all others similarly
situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

**PLAINTIFF'S MOTION TO BIND
AND/OR COMPEL ORCP 39C(6)
DEPOSITION ANSWERS**

Date: July 11, 2008

Time: 1:30 p.m.

Court: The Hon. Jerome LaBarre

Rm: 702

REQUEST FOR ORAL ARGUMENT: Pursuant to UTCR 5.050, Plaintiff estimates the time needed for oral argument to be 20 minutes. Court reporter services are not required.

UTCR 5.010 CERTIFICATION OF COMPLIANCE: Plaintiff's attorneys certify they made good faith efforts to confer and did confer with opposing counsel to resolve this matter, but the parties are unable to reach resolution.

Therefore, **PLAINTIFF MICHAEL MIGIS** moves this Court for an order:

1. Binding AutoZone to certain ORCP 39C(6) deposition answers.
2. In the alternative or in addition thereto, compelling Defendant AutoZone to, within five (5) business days of hearing on this matter, produce for deposition in Oregon one

1 or more designees to answer Plaintiff's prior deposition questions (set forth below)
 2 because:

- 3 a. Defendant AutoZone failed to adequately prepare one or more designees to
- 4 testify as to the issues set forth in Plaintiff's Notice of Deposition; and
- 5 b. Defendant's counsel improperly instructed the corporate designee not to
- 6 answer deposition questions.

7 Plaintiff supports this *Motion* with the *Declaration of Chey K. Powelson* ("*Powelson*
 8 *Decl.*"), and also refers the Court to Plaintiff's *First Motion for Order Compelling Discovery* and
 9 *Motion to Enforce Court Order* because the issues on all motions are inextricably connected.

10 For the specific deposition questions to which Plaintiff seeks complete answers, see
 11 *Powelson Decl.*, Ex. A (underlined answers).

12 13 I. POINTS & AUTHORITIES ¹

14 The Court should grant Plaintiff all just relief because although Rule 39C(6) is designed
 15 to streamline the discovery process, the May 15 deposition of AutoZone was anything but
 16 streamlined. A corporation has a duty to prepare one or more persons to testify as to the issues
 17 set forth in a 39C(6) Notice of Deposition. Even though that duty may be burdensome, it is the
 18 logical and acceptable result of the corporation's privilege use the corporate form to conduct
 19 business.

20 Oregon Rule of Civil Procedure 36B allows discovery into any matters, not privileged,
 21 relevant to a party's defenses. The Oregon Court of Appeals has recently recognized the
 22 importance of discovery into affirmative defenses. Facts underlying affirmative defenses are not
 23 privileged, nor are they work product, especially where those facts were created or arose as part
 24

25 ¹ See also all briefing relating to Plaintiff's *Motion to Enforce Court Order* (and
 26 supporting declarations), incorporated herein by this reference.

1 of the corporation's normal course of business. Contention discovery by means of the 39C(6)
 2 mechanism is an important mechanism by which to discover a corporation's subjective beliefs
 3 and interpretation of documents and events at issue in a lawsuit.

4 Defendant AutoZone first indicated it would move for a protective order on the issue of
 5 Plaintiff's April 10, 2008 ORCP 39C(6) deposition, but then later changed its mind. AutoZone's
 6 corporate designee then appeared in Oregon on May 15 and failed to answer numerous questions
 7 relating to the issues set forth in the deposition Notice, or was otherwise instructed not to answer
 8 by AutoZone counsel.

9 The issues set forth in this *Motion* also support Plaintiff's contention that the May 30,
 10 2008 ORCP 39C(6) of AutoZone should occur in Oregon. An important factor courts look to in
 11 determining the location (of a 30(b)(6) deposition) is the likelihood of significant discovery
 12 disputes. See *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381 (M.D.N.C. 1988). The greater the
 13 likelihood, the more appropriate the litigating forum is where the deposition should occur.

14 **A. ORCP 39C(6) Deposition as a Fact-Finding Mechanism**

15 **1. Purpose of ORCP 39C(6)**

16 Oregon Rule of Civil Procedure 39C(6) provides, in part:

17 A party may in the notice * * * name as the deponent a public or private
 18 corporation * * * and describe with reasonable particularity the matters on
 19 which examination is requested. In that event, the organization so named shall
 20 designate one or more officers, directors, managing agents, or other persons
 21 who consent to testify on its behalf, and shall set forth, for each person
 22 designated, the matters on which such person will testify.

23 The ORCP 39C(6) mechanism, just like its Federal counter-part Fed.R.Civ.Pro. 30(b)(6),
 24 "streamlines the discovery process" to prevent a corporation from "bandying" or "sandbagging"
 25 the deposing party. *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 303, 304
 26

(3rd Cir. 2000).² The term “bandying” in this context includes the situation where a corporation’s officers or managing agents are deposed in turn but each disclaim knowledge of relevant facts. *Id.* at 304 (referring to the Federal Advisory Committee Notes) (quotes omitted).

Nonetheless, during the May 15 ORCP 39C(6) deposition of AutoZone, Defendant’s counsel told Plaintiff, “You can’t have payroll and policy questions in one notice and expect one person in one state to be able to answer all of those questions, so you have to make choices.” *Powelson Decl.*, Ex. A (p. 141:9-12).

“[I]f a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears * * * but sleeps through it.” *Black Horse Lane*, 228 F.3d at 304. Accord, *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993). “Indeed, * * * the purpose behind Rule 30(b)(6) undoubtedly is frustrated * * * [when] a corporate party produces a witness who is unable and/or unwilling to provide the necessary factual information on the entity’s behalf.” *Black Horse Lane* at 304.

2. Duty to Prepare One or More Persons to Testify

Upon receipt of an ORCP 39C(6) notice of deposition, a corporation has an affirmative duty to both designate and prepare one or more designees to testify on “matters known or reasonably available to the organization.”

A corporate litigant’s duty to designate one or more persons requires that the corporation “make a conscientious good faith endeavor to designate [those] having knowledge of the matters sought by [the deposing party],” *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D.Minn. 2000) (cite omitted), or designate and prepare one or more persons on matters

² Federal cases interpreting the Federal counterparts to an Oregon Rules of Civil Procedure may be persuasive. See e.g., *Goldsborough v. Eagle Crest Partners, Ltd.*, 105 Or App 499, 503 (1991), *aff’d*, 314 Or 336 (1992) (in context of ORCP 43); *Hahn v. Hills*, 70 Or App 275, 279-80 (1984) (in context of ORCP 46); and *State ex rel. Thesman v. Dooley*, 270 Or 37, 43-44 (1974) (in context of former discovery statute ORS 41.615).

1 reasonably known or available to the organization.³ It is irrelevant whether a potential designee
 2 has personal knowledge of the subject matters; the corporation must prepare that designee to
 3 testify on the noticed subjects.⁴

4 Upon designation, the designee is obligated to review any and all relevant documents
 5 within the corporation's possession, custody or control. *Calzaturificio S.C.A.R.P.A., s.p.a. v.*
 6 *Fabiano Shoe Co.*, 201 F.R.D. 33, 39 (D.Mass. 2001).

7 "Even if the documents are voluminous and the review of those documents would be
 8 burdensome, the deponents are still required to review them in order to prepare themselves to be
 9 deposed." *Calzaturificio*, 201 F.R.D. at 37. See also *Bank of New York v. Meridien Biao Bank*
 10 *Tanzania, Lt'd*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (deponent must be prepared "to the extent
 11 matters are reasonably available, whether from documents, past employees, or other sources.").

12 "Any other interpretation of the Rule would allow the responding corporation to
 13 'sandbag' the **depositional process** 'by conducting a half-hearted inquiry before the deposition
 14 but a thorough and vigorous one before the trial.'" *Prokosch*, 193 F.R.D. at 639 (bold added)
 15 (cite omitted).

16 This affirmative yet sometimes burdensome obligation to prepare its designees is merely
 17 the "result of the concomitant obligation from the privilege of being able to use the corporate
 18 form * * * to conduct business." *Taylor*, 166 F.R.D. at 362. There are no "less onerous means
 19

20 ³ See *Casper v. Esteb Enters.*, 119 Wash App 759, 767 (Div. 2, 2004) (in context of
 21 Washington's Civil Rule 30(b)(6)); *Briddell v. St. Gobain Abrasives Inc.*, 233 F.R.D. 57, 60
 22 (D.Mass. 2005) (in context of Fed.R.Civ.Pro. 30(b)(6)) (citing *U.S. v. Taylor*, infra); *Starlight*
 23 *Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 637-38, 639 (D.Kan. 1999); *U.S. v. Taylor*, 166 F.R.D. 356,
 24 361 (M.D.N.C. 1996), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996); *King v. Pratt & Whitney*, 161
 F.R.D. 475, 476 (S.D.Fla. 1995) *aff'd*, 213 F.3d 646 (11th Cir. 2000); *Ferko v. NASCAR*, 218
 F.R.D. 125, 142 (E.D.Tx. 2003); *Concerned Citizens v. Belle Haven Club*, 223 F.R.D. 39
 (D.Conn. 2004).

25 ⁴ See *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75-76 (D.Neb. 1996); *United*
 26 *States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996); *Buycks-Roberson v. Citibank Fed.*
Savings Bank, 162 F.R.D. 338, 343 (N.D.Ill. 1995).

1 of assuring that the position of a corporation that is involved in litigation[] can be fully and fairly
2 explored.” *Prokosch*, 193 F.R.D. at 639.

3 In sum, the corporate designees must be prepared to testify as to “the knowledge of the
4 corporation and the corporation’s subjective beliefs and **opinions and interpretation of**
5 **documents and events.**” *Flower v. T.R.A. Indus., Inc.*, 127 Wash App 13, 40 (Div. 3, 2005), *rev.*
6 *denied*, 156 Wash 2d 1030 (2006) (bold added).⁵

7
8 **B. Privilege, Work Product, and Discovery Into Facts Underlying Affirmative Defenses**

9 **1. Attorney-Client Privilege**

10 Under Oregon law, the attorney-client privilege does not protect mere facts from
11 disclosure; rather the privilege protects “confidential communications” made for the purpose of
12 facilitating the rendition of professional legal services to the client. See e.g., *State ex rel. Or.*
13 *Health Sci. Univ. v. Haas*, 325 Or 492, 500-01 (1997) (also citing *Upjohn Co. v. United States*,
14 449 U.S. 383 (1981)). “Confidentiality lies at the heart of the privilege, for unless the
15 communication is ‘not intended to be disclosed to third persons,’ it is not protected by the
16 privilege at all.” *State v. Durbin*, 335 Or 183, 190 (2003) (referring to OEC 503(1)(b)).

17 In *Upjohn*, the United States Supreme Court also distinguished between disclosure of
18 underlying facts and disclosure of “privileged” communications: “The protection of the privilege
19 extends only to communications and not to facts. A fact is one thing and a communication
20 concerning that fact is an entirely different thing.” 449 U.S. 383, 395-96.

21 Thus, facts that are created or exist as a part of a corporation’s normal course of business,
22 such as whether AutoZone paid all its terminating employees in a timely manner under ORS
23 652.140, cannot constitute privileged communications.

24
25 ⁵ See *Taylor*, 166 F.R.D. at 361; *Paul Revere Life Ins. Co. v. Jafari*, 206 F.R.D. 126, 127
26 (D.Md. 2002); *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006); *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D.Neb. 1995); *Casper*, 119 Wn App at 766-67; and *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 172-73 (D.D.C. 2003).

Instructions not to answer may be made if the information sought is actually privileged.
ORCP 39(D)(3)(c).

2. Work Product Protection

The work product doctrine protects completely from disclosure only those documents and tangible things reflecting the “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” and otherwise only generally protects information⁶ “prepared in anticipation of litigation or for trial * * *.” ORCP 36B(3).

3. Privilege and/or Work Product Waiver

Even where a privilege or work product protection would apply, a party can waive such protection by either implied waiver or putting the subject “at issue” in the lawsuit. This prevents a party from using the privilege or factual, non-opinion work product as both a shield and a sword.⁷

AutoZone has attempted to, on the one hand, use its Affirmative Defenses and objections and denials to Plaintiff’s Requests For Admission as a sword by claiming that AutoZone timely paid every terminating employee, has not knowingly done so otherwise, acted in good faith, and that any conduct it did engage in was for “lawful business reasons.” See also pp. 14-15 of Plaintiff’s *Supplemental Briefing Supporting Plaintiff’s Motion to Enforce Court Order*.

And on the other hand AutoZone attempts to use the work product as a shield by refusing Plaintiff inquiry into the very matters and facts AutoZone must have known or investigations conducted to deny Plaintiff’s Requests For Admission.

///

⁶ Without a showing of substantial need and undue hardship by the discovering party.

⁷ See e.g., *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577-78 (9th Cir. 1992); *United States v. Ortiland*, 109 F.3d 539, 543 (9th Cir. 1997); *In re EchoStar Communs. Corp.*, 448 F.3d 1294, 1300-04 (Fed. Cir. 2006); and *Granite Partners, L.P. v. Bear, Stearns & Co.*, 184 F.R.D. 49, 54-55 (S.D.N.Y. 1999) (discussing various ways in which work product may be waived).

1 **4. Contention Discovery Into Affirmative Defenses**

2 “For all forms of discovery, parties may inquire regarding any matter, not privileged,
3 which is relevant to * * * the claim or defense of any other party * * * .” ORCP 36B(1).

4 The objective of an affirmative defense “is to provide a legal or factual basis for a finding
5 in the defendant’s favor.” *State ex. rel. Frohnmayer v. Freeman*, 131 Or App 336, 342 (1994).
6 “To be viable,” an affirmative defense should “be capable of supporting a showing that
7 defendants are not liable under the facts alleged * * * .” *Id.* at 343.

8 Even though “affirmative defenses are obviously legal in nature, * * * the facts which
9 support them are not.” *United States EEOC v. Caesars Entm’t, Inc.*, 237 F.R.D. 428, 435
10 (D.Nev. 2006). “[O]btaining the factual bases for a defendant’s asserted position statements or
11 affirmative defenses is not novel.” *Id.* at 433. This is also known as contention discovery.

12 One type of “contention discovery” is to request that a litigant “state all the *evidence* on
13 which it *bases* some specified contention.” *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328,
14 332 (N.D.Cal. 1985) (*italics original*) (describing different types of contention
15 discovery/interrogatories).⁸ Cf. ORCP 45, which allows a party to propound requests for
16 admission on matters within the scope of ORCP 36B, “including facts or opinions of fact, or the
17 application of law to fact[.]”

18 Discovery seeking “each and every fact” or “all facts” upon which a litigant bases its
19 contentions may be overly broad. See *Lucero v. Valdez*, 240 F.R.D. 591, 594 (D.Kan. 2007) (in
20 context of contention interrogatories) (cites omitted). Rather, a better approach is to seek the
21 “material or principal facts that support a party’s contentions * * * .” *Id.*

22 _____
23 ⁸ See also *Hiskett v. Wal-Mart Stores*, 180 F.R.D. 403, 404-05 (D.Kan. 1998) (Court
24 noting the propriety of contention interrogatories asking for “‘**principal or material**’ facts which
25 support an allegation or defense.”) (bold added); *United States v. Boyce*, 148 F.Supp.2d 1069,
26 1086 (S.D.Cal. 2001) (“The [plaintiff’s] contention interrogatories are not directed to issues of
 ‘pure law’ that would infringe on the attorney-work product doctrine as codified in Rule 26(b)(3).
 Rather, **they seek the facts upon which [defendants] relied for their defense * * * .**”); and *U.S.*
 v. Taylor, 166 F.R.D. 356, 362, *aff’d*, 166 F.R.D. 367 (M.D.N.C. 1996).

1 The Oregon State Court of Appeals recently recognized that “[t]he importance of
2 discoverable documents to affirmative defenses is a sufficient ground for dismissal as a sanction
3 for failing to produce [them].” *Asato v. Dunn*, 206 Or App 753, 758 (2006) (affirming
4 Multnomah County Circuit Court’s dismissal of plaintiffs’ lawsuit as a sanction for failing to
5 comply with an order to produce information potentially relevant to defendants’ affirmative
6 defenses).

7 “There is simply nothing wrong with asking for facts from a deponent even through those
8 facts may have been communicated to a deponent by the deponent’s counsel.” *Caesars Entm’t*,
9 237 F.R.D. at 434 (citing *Protective Nat’l Ins. Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267,
10 280 (D.Neb. 1989) (*Protective* court ordering a defendant to produce a corporate designee to
11 “recite the facts upon which [defendant] relied to support the allegations of its answer and
12 counterclaim which are not purely legal, even though those facts may have been provided to her
13 or her employer by [defendant’s] lawyers.”)).

14 In fact, the affirmative duty imposed upon a corporation to designate persons with
15 knowledge “of the underlying facts of the case is **not altered** in any way if that witness learned
16 of the information by consulting documents protected as attorney work product.” *Caesars*
17 *Entm’t*, 237 F.R.D. at 434 (bold added).⁹ The underlying rationale for this is that attorneys for
18 a corporation cannot directly represent the corporation’s interests on their own.

19 “If a corporation has knowledge or a position as to a set of alleged facts or an area of
20 inquiry [during deposition], it is its officers, employees, agents or others who must present
21 the position, give reasons for the position, and, more importantly, stand subject to
22 cross-examination.” *Taylor*, 166 F.R.D. at 362 (bold added). Accord, *Flower*, 127 Wash App
23 at 40 - 41.

24
25 ⁹ See also *Paul Revere Life Ins. Co.*, 206 F.R.D. at 127 (ordering a party to produce a
26 30(b)(6) witness to testify regarding facts obtained by counsel during discovery); and *Security Ins.*
Co. of Hartford v. Trustmark Ins. Co., 218 F.R.D. 29, 34 (D.Conn. 2003) (ordering a party to
re-produce a 30(b)(6) designee to testify as to facts supporting its allegations in the pleadings).

1 Otherwise, the entire discovery process would grind to a halt if a defendant corporation's
 2 attorneys were allowed to contaminate the corporation's knowledge, including its subjective
 3 beliefs and opinions and interpretation of documents and events, by asserting privilege or work
 4 product over that knowledge.

5
 6 **C. Procedural History Leading Up to the May 15, 2008 39C(6) Deposition**

7 **1. Court-Ordered Documents**

8 Approximately six weeks after the initial response due date, AutoZone finally submitted
 9 denials to Plaintiff's First Requests For Admissions 1 - 3 on February 29, 2008. And after the
 10 Court ordered AutoZone on March 7 to produce the documents supporting its denials to
 11 Plaintiff's Requests For Admission, AutoZone belatedly produced the four-page Excel
 12 spreadsheet in .pdf format (Bates Nos. AZ/MIGIS 0001212 - 1215), and several other pages of
 13 supporting information including "PeopleSoft Action Codes" reflecting whether an employee
 14 "quit with notice."

15 During an April 8 hearing on that matter, Defendant's counsel confirmed to the Court that
 16 AutoZone's spreadsheet was the document Defendant relied upon to deny Plaintiff's Requests
 17 For Admission.¹⁰

18 On or about April 10, 2008, Plaintiff served his ORCP 39C(6) Notice of Deposition for
 19 May 15, 2008. *Powelson Decl.*, Ex. B. The issues set forth in that Notice requested AutoZone's
 20 testimony on material facts relating to certain Affirmative Defenses, as well as:

- 21 (a) "All material facts related to Defendant's denials to Plaintiff's First Requests For
 22 Admission Nos. 1 - 3," and
 23 (b) "The document(s) Bates-numbered AZ/MIGIS 0001212 - 1215 * * * including * *

24
 25 ¹⁰ See Exhibit C (pp. 3:19 - 4:8; 5:12 - 16; 10:16 - 11:1; 11:25 - 12:2) to the *Supplemental*
 26 *Declaration of Chey K. Powelson* in support of Plaintiff's *Supplemental Briefing Supporting*
Plaintiff's Motion to Enforce Court Order. See also fn 5 to that *Supplemental Briefing*.

* the form and content of those document(s) (e.g., **identification and meaning of all fields**, sources of data found therein, and the definition of all PeopleSoft Action Codes).”

Powelson Decl., Ex. B (¶¶ 8 - 9 (bold added)).

2. Pre-Deposition Discovery Conferences on the ORCP 39C(6) Notice of Deposition

Plaintiff’s counsel had advised Defendant’s counsel Neil Olsen during an in-person discovery conference on April 8 that for purposes of an ORCP 39C(5) request for production accompanying the anticipated Notice of deposition, the Notice would have to be issued at least 30 days prior the deposition date so as to comply with ORCP 43. Defendant’s counsel Olsen prior to that conference had requested a “draft” Notice, but then during the later, in-person conference declined to stipulate to a shorter 39C(5) production period (under 30 days) if Plaintiff would try to accommodate Defendant. *Powelson Decl.*, Ex. C (p. 2), ¶ 4. Therefore, Plaintiff was forced to send out the 39C(6) Notice and request for production.

On April 16 Defendant served its written objections to the Notice, based on the grounds that “affirmative defenses are legal defenses that are subject to legal argument and conclusions.” *Powelson Decl.*, Ex. D. Defendant then requested that Plaintiff re-draft the Notice of Deposition. *Id.*

Also on April 16, Plaintiff responded with a letter to Defendant’s counsel, setting forth the proposition that “contention discovery” into affirmative defenses by means of an ORCP 39C(6) deposition is appropriate. The next day the parties conferred via telephone to resolve the issues in dispute. *Powelson Decl.*, ¶ 5.

With respect to the issues set forth in ¶ 8 of the Notice (facts relating to Defendant’s denials of Plaintiff’s Requests For Admission) and ¶ 9 (content of the Excel summary report), Defendant’s counsel Leigh Ann Tift indicated that it is not any part of any AutoZone employee’s job in the State of Oregon to possess that kind of information. *Powelson Decl.*, ¶ 5, Ex. E (p. 3).

///

1 During that April 17 discovery conference Plaintiff further referred Defendant's counsel
2 to *Asato v. Dunn. Powelson Decl.*, ¶ 5.¹¹

3 The parties conferred again via telephone again on April 18 regarding the ORCP 39C(6)
4 Notice. *Powelson Decl.*, ¶ 6. That conference included discussion of the definition of "material
5 fact" (a fact that is "significant or essential to the matter at hand"), and each 39C(6) issue,
6 including the following:

- 7 1. Defendant claimed it could not designate a "fact" witness for ¶ 1 (e.g., all material
8 facts related to Defendant's First Affirmative Defense that Plaintiff fails to state any
9 claim for which Plaintiff Migis may serve as an adequate class representative).
10 Inquiry into this matter would have included why AutoZone believed its payment of
11 wages and treatment of Mr. Migis was unique, and not common and/or typical of
12 everyone else in the putative class.
- 13 2. Defendant could only designate a regional human resources person to testify as to
14 AutoZone's payroll policies as they relate to ¶ 2 (that under Defendant's Second
15 Affirmative Defense AutoZone treated Plaintiff and all putative class members in
16 good faith, paid them all monies due or believed to be due, and took those actions in
17 accord with "lawful business reasons and in good faith.").
- 18 3. Defendant claimed that it is a pure legal conclusion regarding whether any unpaid
19 wages were unpaid, they were subject to a bona fide, good faith dispute (¶ 5,
20 Defendant's Fifth Affirmative Defense). Defendant further contended that it could
21 produce a witness to testify on AutoZone's pay policies.
- 22 4. As for Defendant's contention that this lawsuit may not be maintained as a class
23 action (which includes commonality, typicality, and *numerosity*), during the April 18

24
25 ¹¹ Such importance may also be based, in part, on Multnomah County's one-year to trial
26 default requirement; *i.e.*, discovery into affirmative defenses must occur, if at all, with enough
time prior to trial to move for summary judgment where appropriate, and/or to narrow the issues
for trial.

1 conference the parties discussed the accessibility of the numbers requested in ¶ 6 a. -
 2 e. of the Notice.

3 5. **Paragraph 8** of the Notice sought AutoZone testimony on the facts supporting its
 4 denials to Plaintiff's Requests For Admission, but AutoZone counsel insisted she
 5 could only produce a designee on payroll policies. Plaintiff reminded Defendant's
 6 counsel Tift that this was not sufficient, and Defendant's delay in producing all
 7 documents as ordered by the Court under the second Court order was affecting
 8 Plaintiff's ability to prepare for the May 15 deposition.

9 6. Perhaps most importantly, **Paragraph 9** of the deposition Notice sought AutoZone
 10 testimony on the Microsoft Excel summary report AutoZone belatedly produced in
 11 response to the Court's first Order, including the form and content of the document,
 12 the meaning of all fields in the documents, and the definition of all PeopleSoft Action
 13 Codes.¹²

14 During the April 18 discovery conference, Defendant's counsel Tift stated she would
 15 see what she could do as to this issue (¶ 9), but stood by the position that since the
 16 summary report was created in Memphis, Tennessee, AutoZone could only designate
 17 someone from that location to testify. (This is the type of "bandying" ORCP 39C(6)
 18 is theoretically designed to prevent.)

19 *Powelson Decl.*, ¶ 6; Ex. F.

20 During the April 18 conference, Defendant's counsel also represented it would be filing
 21 a motion for protective order in regards to the Notice of Deposition, but could not provide
 22 Plaintiff with a date by which such filing would occur. *Powelson Decl.*, ¶ 7.

23 On May 12, 2008, Plaintiff's counsel reiterated to Defendant that Plaintiff expects to
 24 depose one or more designees in the State of Oregon "on all matters for which AutoZone is

25 _____
 26 ¹² PeopleSoft is a human resources-type of software apparently used by AutoZone to
 manage information about its employees.

1 noticed to appear pursuant to ORCP 39C(6).” *Powelson Decl.*, Ex. I.

2 **D. The May 15, 2008 39C(6) Deposition**

3 By the date of deposition on May 15, Defendant had not filed a protective order even
4 though AutoZone had received the deposition Notice approximately one month earlier. Instead,
5 AutoZone produced one designee in Oregon to testify.

6 At the outset of the deposition, Defendant’s counsel objected to the Notice, but went on
7 to state that notwithstanding those objections, “[W]e have prepared [the designee]. What I can
8 tell you is that to the extent that the questions are fact based, he’s prepared to answer them.”
9 *Powelson Decl.*, Ex. A (p. 5:16-20).

10 Unfortunately, the designee could not answer many of Plaintiff’s counsel’s questions.
11 In addition, it is Plaintiff’s position that Defendant’s counsel improperly made numerous
12 instructions for the designee not to answer Plaintiff’s questions into, among other things, the facts
13 relating to Defendant’s denials to Requests For Admission and whether the designee or anyone
14 else for AutoZone did any investigation into the matters set forth in the Notice of Deposition.
15 Those matters are not protected by the attorney-client privilege or work product doctrine.

16 The questions and failures to answer or instructions not to answer are summarized below,
17 and fully set forth in Exhibit A to the *Powelson Declaration*. For those answers of “I don’t
18 know” or something similar, the Court should bind AutoZone to those answers, or in the
19 alternative order answers. The Court should also order answers to those questions AutoZone
20 counsel made instructions not to answer, to the extent that the answer either (a) would not have
21 revealed “privileged” or work product information, or (b) would have revealed information
22 already at issue in this lawsuit (e.g., by virtue of Defendant’s denials to Requests for Admission).

23 ///

24 ///

25 ///

26

1 **1. AutoZone's Testimony on Facts Relating to Its Denials of RFA Nos. 1 - 3 (¶ 8)**
 2 **and the Contents of the Excel Summary Report (¶ 9, *Powelson Decl., Ex. B*)**¹³

- 3 • The designee had not, prior to being placed under oath, read Plaintiff's Request
 4 For Admission No. 1. *Powelson Decl., Ex. A* (p. 119:20-23).
- 5 • Instructions not to answer questions relating to whether there were additional
 6 documents the designee looked at or of which he was aware that were the basis
 7 for AutoZone's denials. *Id.* (pp. 106:2 - 107:24; 115:23 - 117:2; 126:13 - 127:19)
- 8 • Instruction(s) not to answer or privilege objections as to whether AutoZone
 9 and/or the designee made an investigation into matters related to AutoZone's
 10 denials, or other topics such as whether employees who quit without notice were
 11 paid timely. *Id.* (pp. 120:9-15; 122:21 - 123:6)
- 12 • Instruction(s) not to answer questions whether the designee (on behalf of
 13 AutoZone) had an understanding of the facts related to the determination by
 14 AutoZone that they should deny Request For Admission No. 1. *Id.* (p. 117:6-11).
- 15 • AutoZone did not know whether the Excel summary report (Exhibit No. 3 to the
 16 deposition) is the basis upon which AutoZone believed it could deny the
 17 Requests For Admission because the designee would have to review additional
 18 documents or reports. *Id.* (pp. 109:7 - 110:2; 124:8-22; 125:14 - 126:2).
- 19 • Instruction not to answer what additional documents AutoZone used to deny
 20 Plaintiff's Requests for Admission. *Id.* (p. 126:3-25).
- 21 • The designee could not answer, by reviewing the Excel summary report, whether
 22 certain employees listed therein timely received their final paycheck. *Id.* (pp.

23
 24 ¹³ As an initial matter, for the first time at deposition Defendant's counsel asserted that
 25 inquiry into (facts relating to) AutoZone's denials to Plaintiff's admissions is an "impossible
 26 question to answer." *Powelson Decl., Ex. A* (p. 156:10-11). At no time prior to or during the
 March 7 hearing on Plaintiff's motion to compel or the resulting hearings on the Court's Orders
 did Defendant assert that production of documents (containing facts) relating to the denials would
 be "impossible."

110:18 - 113:13; 114:3 - 115:22; 120:9 - 122:16).

- The designee did not review information in the Excel summary report with any other information or documents, and the designee did not have an understanding as to whether the summary report was accurate. *Id.* (p. 113:14-24).
- AutoZone could not answer, by reviewing the documents underlying the Excel summary report, whether AutoZone timely paid an employee their final wages. *Id.* (pp. 129:1 - 132:11; 138:6 - 140:13; 153:12 - 155:8).
- AutoZone could not define and give meaning to the PeopleSoft Action (termination) codes such as “quit with notice,” “quit without notice,” or “job abandonment,” as set forth on the Excel summary report. *Id.* (pp. 93:13 - 98:2; 164:8-11).

2. Issues Relating to the Numerosity Requirement of ORCP 32A (§ 6, *Powelson Decl., Ex. B*)

Oregon Rule of Civil Procedure 32A requires, in part, that the putative class must be numerous for a case to be certified as a class action. Rule 32C requires a court to make findings of fact regarding whether certification is appropriate. Notwithstanding Defendant counsel Leigh Ann Tift’s admission on the April 22, 2008 hearing record that the class is “enormous,” Plaintiff sought testimony from AutoZone regarding numerosity.

Plaintiff served the ORCP 39C(6) notice in mid-April 2008. During the May 15 deposition, however, in response to many of Plaintiff’s questions regarding the total number of Oregon hourly employees who worked during certain periods of time relevant to this lawsuit, the designee answered with, “I don’t have [a number],” “I have no idea,” “No, I don’t have that [number],” or “No,” he did not have that information. *Powelson Decl., Ex. A* (pp. 160:1 - 168:1).

Instead, Defendant’s counsel informed Plaintiff that Defendant was “working on it.” *Powelson Decl., Ex. A* (163:23-25). Defendant later suggested that someone such as Plaintiff could “go through the [employee] records and count them up,” even though Defendant had

1 previously refused to produce one year's worth of Oregon AutoZone employee time records. *Id.*
 2 (p. 165:1-8).¹⁴

3 Nonetheless, Defendant's counsel committed to providing Plaintiff with the answers to
 4 these deposition questions at a later date. The parties discussed this on the record. *Powelson*
 5 *Decl.*, Ex. A (pp. 163:25; 166:7).

6 But by May 28, almost six weeks after having first received the Notice of Deposition,
 7 AutoZone still had not provided the information; it subsequently committed to doing so by June
 8 3. *Powelson Decl.*, Ex. G. In response, Plaintiff advised that for purposes of scheduling issues,
 9 this topic would have to be addressed in this *Motion*, and if and when Defendant provided
 10 complete information, prior to the hearing the parties could inform the Court. But as an
 11 alternative to including this topic in the *Motion*, Plaintiff requested that Defendant allow Plaintiff
 12 to raise the issue in the *Reply* briefing, if needed. Defendant's counsel did not respond to this
 13 request. *Id.*, Ex. G; ¶ 8.

14 In the event the parties resolve this issue before the July 11 hearing date, Plaintiff will
 15 inform the Court.

16 **3. AutoZone's Testimony of Facts Supporting Specific Affirmative Defenses (¶¶**
 17 **1 - 3, & 5)**

18 ***First Affirmative Defense*** (Plaintiff fails to state any claim for which, in part, class-
 19 wide relief may be granted)

- 20 • AutoZone could not testify as to any facts of which AutoZone was aware that
 21 would give rise to its contention that Plaintiff Migis could not obtain relief in this
 22 lawsuit for meal breaks. *Powelson Decl.*, Ex. A (pp. 41:14 - 47:9).

23 ///

24
 25 ¹⁴ This further supports Plaintiff's contention that one out of three employees' time
 26 records will not constitute adequate, pre-class certification. See *Plaintiff's Second Motion for*
Order Compelling Discovery.

1 **Second Affirmative Defense** (Plaintiff and the putative class were treated fairly and
 2 in good faith; paid all monies due and/or believed to be due; and the amount and
 3 calculation of wages paid were undertaken with lawful business reasons and in good
 4 faith.)

- 5 • The designee did not know how to answer whether Plaintiff Migis was “paid or
 6 not paid.” *Powelson Decl.*, Ex. A (pp. 47:19 - 49:13). Instead, the designee
 7 indicated that AutoZone Payroll would be qualified to answer whether an hourly
 8 employee would be paid for a shortened meal period. *Id.* (pp. 50:14 - 51:18;
 9 63:17-22).
- 10 • AutoZone did not know what “lawful business reasons” AutoZone may have
 11 believed governed its payment (or non-payment) of short lunch periods. *Id.* (pp.
 12 52:23 - 53:5; 54:18 - 57:22; 58:14-20; 60:25 - 61:14; 61:20 - 62:18).
- 13 • The designee did not make any inquiries prior to deposition so as to answer
 14 questions as to whether the amount of calculation of wages paid to Plaintiff Migis
 15 and the putative class was in accordance with lawful business reasons and good
 16 faith. *Id.* (pp. 62:22 - 63:16).

17 **Third Affirmative Defense** (Plaintiff and the putative class are estopped from
 18 claiming additional and/or unpaid compensation by reason of actions including failing
 19 to report compensable time)

- 20 • AutoZone had no personal understanding or knowledge of individuals who have
 21 failed to report compensable time, and had no understanding of or information
 22 as to whether Plaintiff Migis or the putative class members failed to report
 23 compensable time. *Powelson Decl.*, Ex. A (pp. 64:21 - 65:3; 74:7-24; 78:23 -
 24 79:11).
- 25 • AutoZone had only “scanned through” a “sampling” of Plaintiff Migis’s time
 26 records, and could not recollect which other people’s time records he had

1 reviewed. *Id.* (pp. 12:18 - 13:18; 50:9-13).

- 2 • AutoZone had no knowledge of whether AutoZone employees “closing” the
- 3 stores at the end of the day failed to report compensable time. *Id.* (pp. 71:5 -
- 4 73:21).
- 5 • AutoZone was not aware of whether AutoZone had a practice or policy to
- 6 discipline employees who failed to report all time worked. *Id.* (p. 79:12-17).

7 ***Fifth Affirmative Defense*** (Any and all unpaid wages are subject to a bona fide, good

8 faith dispute in that AutoZone has paid all wages that it knows or knew were due, and

9 that therefore Autozone should not be subject to the imposition of penalties (willfulness))

- 10 • AutoZone would not know or be able to testify as to the good faith belief and
- 11 bona fide dispute. *Powelson Decl.*, Ex. A (pp. 80:11 - 81:2).

12 **E. Post-Deposition Discovery Conference**

13 The day after the 39C(6) deposition, during a phone conference with AutoZone’s counsel

14 Plaintiff requested that Defendant re-produce a designee to appear and answers the questions to

15 which the prior designee said he did not know. Defendant’s counsel declined to produce anyone,

16 and instead objected that the Notice was too broad. Plaintiff’s counsel then pointed out the very

17 specific issues set forth in ¶ 9 (content of the Excel summary report, and the meaning of the

18 PeopleSoft Action Codes).

19 Defendant did not change its position on the matter, but instead stated again in a letter

20 that “the objections we raised with respect to the categories listed in the notice still stand, and *

21 * * we will not re-designate a witness on categories we believe will result in impermissible

22 inquiries into attorney-client privileged information.” *Powelson Decl.*, Ex. H.

23 AutoZone’s counsel went on to admit that she instructed the designee “not to answer a

24 question regarding what documents were relied on in connection with the Request For

25 Admissions.” *Powelson Decl.*, Ex. H.

26 ///

1 AutoZone's statement is especially concerning because:

2 (a) The Court on March 7 had already ordered Defendant to produce documents relating
3 to Defendant's denials (RFP Nos. 2, 4 and 6), and AutoZone failed to contend either in its
4 briefing or during hearing on the matter that there were any documents protected by privilege or
5 work product.

6 (b) By the Court-ordered deadline of March 28 Defendant in its "second supplemental
7 response" to Plaintiff Requests for Production seeking documents upon which Defendant based
8 its denials failed to lodge an objection on the grounds of attorney-client privilege or work
9 product.

10 (c) During the April 22 hearing on Defendant's *Motion For Extension of Time*,
11 Defendant's counsel did not express concerns about privilege or work product relating to the
12 documents to be produced and relating to Defendant's denials of the Requests For Admission.

13 Moreover, the Court should note that Defendant's apparent objections to the April 10
14 39C(6) Notice at issue in this *Motion* are not objections Defendant set forth or referenced in its
15 *Motion for Protective Order* from Plaintiff's second ORCP 39C(6) Notice, despite at least one
16 issue in the second Notice being almost identically-worded ("all material facts relating to") to the
17 April 10 Notice.

18 F. Relief Requested

19 1. Overview

20 If during the course of an ORCP 39C(6) deposition "the originally designated
21 spokesman for the corporation lacks knowledge in the identified areas of inquiry, that does not
22 become the inquiring party's problem, but demonstrates the responding party's failure of duty."
23 *Calzaturificio*, 201 F.R.D. at 39 (cite omitted) (in context of Fed.R.Civ.Pro. 30(b)(6)).

24 "[I]nadequate preparation of a 30(b)(6) designee can be sanctioned, 'based on a lack of
25 good faith, prejudice to the opposing side, and disruption of the proceedings.'" *Casper*, 119
26 Wash App at 768 (cite omitted).

1 There are two overlapping approaches for remedying such a failure: (1) treating it as a
 2 failure to appear under ORCP 46D; and (2) treating it as a failure to answer the deposing party's
 3 questions under ORCP 46A.

4 AutoZone's failure to prepare, produce, and allow a designee to answer deposition
 5 questions has not only affected Plaintiff's ability to gain even a basic understanding of documents
 6 Defendant produced under two Court Orders, but may have also disrupted the proceedings to the
 7 extent that Plaintiff cannot obtain facts from AutoZone as a corporation. This has subsequently
 8 delayed Plaintiff's ability to interpret the necessary documents and information relating to the
 9 putative class late pay claim, and draft the motion for class certification as it relates to that issue.

10 Plaintiff therefore requests that the Court either (a) bind AutoZone to its non-responsive
 11 answers and preclude it from offering contrary evidence later; or (b) order Defendant to, at its sole
 12 expense (including Plaintiff's attorneys' fees associated with having to appear at an additional
 13 deposition) designate and produce one or more persons to appear in Oregon and answer those
 14 questions to which AutoZone previously did not know the answers.

15 **2. ORCP 46D – Failure to Appear**

16 The “‘failure to act’ in Rule 37(d) includes a failure to designate a witness to testify at
 17 a deposition.” *Ferko*, 218 F.R.D. at 142 (in context of Federal equivalent to ORCP 46D) (cite
 18 omitted). Therefore, if under ORCP 39C(6) “the agent [of a corporation] is not knowledgeable
 19 about relevant facts, and the principal has failed to designate an available, knowledgeable, and
 20 readily identifiable witness, then the appearance is, for all practical purposes, no appearance at
 21 all.” *Black Horse Lane Assoc.*, 228 F.3d at 303 (in context of Federal equivalent to ORCP 46D).

22 “If * * * a person designated under Rule 39 C.(6) * * * to testify on behalf of a party fails
 23 (1) to appear before the officer who is to take the deposition * * *, the court in which the action
 24 is pending on motion may make such orders in regard to the failure as are just * * *.” ORCP
 25 46D. That failure to act “may not be excused on the ground that the discovery sought is
 26 objectionable unless the party failing to act has applied for a protective order as provided by Rule

1 36 C.” ORCP 46D.

2 Although AutoZone had initially indicated it would move for a protective order on the
3 issue of Plaintiff’s ORCP 39C(6) Notice, after Plaintiff’s inquiries as to the timing of that motion,
4 Defendant finally indicated it would not file any such motion. Defendant then appeared at
5 deposition and offered incomplete or un-responsive answers to Plaintiff’s questions.

6 One type of “sanction” for a failure to appear is to bind the corporation to its 39C(6)
7 answers. In *Casper v. Esteb Enters.*,¹⁵ the Court of Appeals affirmed a Clark County,
8 Washington trial court judge’s sanction binding a corporation to its Rule 30(b)(6) deposition
9 answers of “don’t know.” 119 Wash App at 764; 770. Although the *Casper* Court declined to
10 acknowledge that a corporation is automatically bound by 30(b)(6) deposition answers, it
11 affirmed such a sanction because the defendant’s “don’t know” answers constituted a “failure to
12 appear.” *Id.* at 768 (citing *Black Horse Lane* at 304).

13 The Court should bind AutoZone to all questions to which it responded with “don’t
14 know,” or anything similar. Those responses were failures to answer by AutoZone.

15 **3. ORCP 46A – Compelling Deposition Answers**

16 When a deponent “fails to answer a question propounded * * *, or a corporation or other
17 entity fails to make a designation under Rule 39 C.(6),” the deposing party “may move for an
18 order compelling discovery in accordance with the request[.]” ORCP 46A(2). “[A]n evasive or
19 incomplete answer is to be treated as a failure to answer.” ORCP 46A(3).

20 If a court grants a motion under ORCP 46A, the court may award reasonable expenses
21 incurred in obtaining the order, unless the opposition to the motion was substantially justified.
22 ORCP 46A(4). Plaintiff requests an award as is just under the circumstances.

23 Plaintiff therefore requests that, in the alternative to binding AutoZone to its non-
24 responsive answers, AutoZone produce one or more designees to testify in Oregon and provide
25

26 ¹⁵ 119 Wash App 759 (Div. 2, 2004).

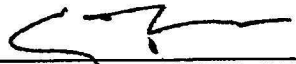
1 complete answers to the un-answered and pending questions, including those (a) relating to
2 Defendant's denials to Plaintiff's Requests For Admissions, and (b) the document AutoZone
3 produced after the first Court-ordered deadline of March 28.

4
5 **II. CONCLUSION**

6 Plaintiff respectfully requests the Court grant all relief requested herein because
7 Defendant (1) is refusing to provide discovery into its affirmative defenses, (2) did not adequately
8 prepare its designee to testify on certain issues, (3) failed to move for a protective order as the
9 Rules require, and (4) made improper instructions not to answer questions within the scope of
10 ORCP 36B and the deposition Notice.

11
12
13
14 DATED this 29th day of May 2008.

BAILEY, PINNEY & ASSOCIATES, LLC

15 
16 _____
17 A.E. "BUD" BAILEY, OSB 87157
CHEY POWELSON, OSB 03551
Attorneys for Plaintiff

CERTIFICATE OF SERVICE


I hereby certify that I caused to be served the foregoing **Plaintiff's Motion to Bind And/or Compel Orcp 39c(6) Deposition Answers** upon:

Amy Alpern
Littlere Mendelson
1750 SW Harbor Way, Suite 450
Portland , OR 97201

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be **hand-delivered** to the person listed above on the date set forth below.

DATED: May 29, 2008



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S MOTION FOR PARTIAL
JUDGMENT ON THE PLEADINGS AND
STATEMENT OF POINTS AND
AUTHORITIES IN SUPPORT**

[ORAL ARGUMENT REQUESTED]

I. REQUEST FOR ORAL ARGUMENT

Pursuant to Uniform Trial Court Rule 5.050, Defendant AutoZone, Inc. requests oral argument on this motion. The time for oral argument is estimated to be 20 minutes. Court reporting services are requested.

II. UTCR 5.010 CERTIFICATE OF COMPLIANCE

AutoZone hereby certifies that its counsel conferred with Bud Bailey, counsel for Plaintiff, on May 20, 2008 regarding the issues set forth in this motion. Counsel for the parties were unable to resolve this dispute.

III. MOTION

Pursuant to Oregon Rule of Civil Procedure 21B, Defendant AutoZone, Inc. ("AutoZone"), brings this motion for judgment on the pleadings and moves the court for the following relief with respect to Plaintiff Michael Migis' ("Migis") Class Action Allegation Complaint ("Complaint"): an order granting partial judgment on the pleadings and dismissing Plaintiff's First and Second Claims

1 for Relief asserting meal and rest period violations because no private right of action for meal and
 2 rest period violations exists. In support of this motion, AutoZone relies on the following Points and
 3 Authorities, the Declaration of Amy R. Alpern ("Alpern Dec."), and the pleadings and records on file
 4 herein.

5 IV. RELEVANT FACTS

6 Migis purports to represent a broad class of "all current and former employees" who worked
 7 for AutoZone in Oregon for a period of six years prior to the date that the Complaint was filed on
 8 November 16, 2007. Migis has alleged violations of Oregon wage and hour laws, including
 9 violations of regulations regarding meal and rest periods. Migis's allegations are fundamentally
 10 flawed, rendering partial judgment on the pleadings proper. Specifically, because Oregon law
 11 provides no private right of action for these claims, they should be dismissed.

12 V. ARGUMENT AND AUTHORITY

13 ORCP 21B authorizes the court to enter judgment on the pleadings: "when the pleadings,
 14 taken together, affirmatively show that the plaintiff has not stated a claim for relief motion for
 15 judgment on the pleadings should be granted." *Slogowski v. Lyness*, 324 Or 436, 439, 927 P2d 587
 16 (1996) (quotation omitted). For purposes of an ORCP 21B motion, a court must accept the
 17 allegations of the pleading as true. *Beason v. Harclerod*, 105 Or App 376, 379-80, 805 P2d 700
 18 (1991). Judgment on the pleadings should be entered when, given the well-pleaded facts, the
 19 defendant is entitled to judgment as a matter of law. *Smith, et al. v. Washington County, et al.*, 180
 20 Or App 505, 523-24, 43 P3d 1171 (2002). Here, there is simply no legal basis for Migis's meal and
 21 rest period claims.

22 A. Migis's Rest Period Claim Should Be Dismissed

23 In his Complaint, Migis claims that AutoZone is liable to him and the putative class members
 24 for unpaid wages because it allegedly failed to provide them with statutorily required rest periods in
 25 violation of OAR 839-020-0050. However, on May 15, 2008, the Oregon Supreme Court held that
 26

1 employees do not have a private right of against their employers to recover unpaid wages for missed
2 rest periods. *Gafur v. Legacy Good Samaritan Hospital and Medical Center*, --- P.3d --- (May 15,
3 2008) (See Attachment A). The claim for missed rest periods in *Gafur* was based on the same
4 statute and regulations on which Migis relies for the missed rest period claims brought on behalf of
5 himself and the putative class members. Because the Oregon Supreme Court's decision in *Gafur*
6 expressly forecloses such a claim, Migis's claim for missed rest periods must be dismissed.

7 **B. Migis's Meal Period Claim Should Be Dismissed**

8 Migis also claims that AutoZone failed to provide him with statutorily required meal periods
9 and therefore seeks unpaid wages from AutoZone on this basis. Migis is incorrect. As noted above,
10 the Oregon Supreme Court foreclosed any claim by employees against their employers for missed
11 rest periods. However, the Court did not consider whether the plaintiffs in *Gafur* could sue their
12 employer for unpaid wages for missed meal periods. A brief history of the litigation in *Gafur* is
13 necessary because it explains why Migis is not entitled to sue AutoZone for missed meal periods
14 despite the fact that the Oregon Supreme Court expressly declined to consider the issue.

15 The plaintiffs in *Gafur* brought a class action complaint against their employer seeking
16 compensation for required meal and rest periods they alleged were not provided to them. The
17 employer filed a motion to dismiss and claimed that the plaintiffs did not have a private right of
18 action available to them for the meal and rest period claims. The trial court agreed and dismissed the
19 meal and rest period claims. The plaintiffs appealed to Oregon's Court of Appeals, *which agreed*
20 *with the trial court as to the plaintiffs' meal period allegations and affirmed the trial court's*
21 *dismissal of those claims*. However, the Court of Appeals agreed with the plaintiffs on their rest
22 period claims and reversed the trial court's order dismissing that claim.

23 As noted above, the Oregon Supreme Court ultimately agreed with the trial court on the
24 plaintiffs' rest period claims, reversed the Court of Appeals' decision, and affirmed the trial court's
25
26

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND
STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT**

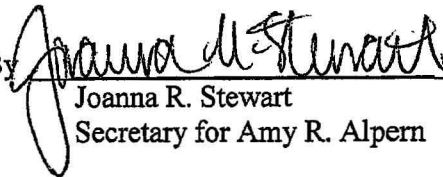
- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By


Joanna R. Stewart
Secretary for Amy R. Alpern

FILED: May 15, 2008

IN THE SUPREME COURT OF THE STATE OF OREGON

ELIZABETH GAFUR
and LINDA WING,
on their own behalf and on behalf of all similarly situated,

Respondents on Review,

v.

LEGACY GOOD SAMARITAN HOSPITAL AND MEDICAL CENTER;
LEGACY HEALTH SYSTEM;
LEGACY MERIDIAN PARK HOSPITAL;
LEGACY EMANUEL HOSPITAL & HEALTH CENTER
and DOES 1 THROUGH 10,

Petitioners on Review,

and

LEGACY MOUNT HOOD HEALTH CENTER,

Defendant.

(CC 0407-07139; CA A130070; SC S055175)

En Banc

On review from the Court of Appeals.*

Argued and submitted March 3, 2008.

Timothy R. Volpert, of Davis Wright Tremaine LLP, Portland, argued the cause and filed the brief for petitioners on review. With him on the brief were Carol J. Bernick and Kevin H. Kono, Portland.

Jacqueline L. Koch, of Bailey, Pinney & Associates LLC, Vancouver, Washington, argued the cause and filed the brief for respondents on review. With her on the brief was J. Dana Pinney, Vancouver, Washington.

Brian R. Talcott, of Dunn Carney Allen Higgins & Tongue LLP, Portland, filed a brief for *amicus curiae* Oregon Restaurant Association.

David H. Wilson, Francis T. Barnwell, and Kathryn M. Hindman, of Bullard Smith Jernstedt Wilson, Portland, filed a brief for *amici curiae* Oregon Association of Hospitals and Health Systems, Portland Business Alliance, Oregon Business Association, Oregon Association Chiefs of Police, Oregon State Sheriffs Association, Special Districts Association of Oregon, Association of Oregon Counties, and League of Oregon Cities.

David F. Rees and Joshua L. Ross, of Stoll Stoll Berne Lokting & Shlachter P.C., Portland, filed a brief for *amicus curiae* Oregon Trial Lawyers Association.

Stacie F. Beckerman, Assistant Attorney General, Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General, Salem, filed a brief for *amicus curiae* Bureau of Labor and Industries.

GILLETTE, J.

The decision of the Court of Appeals is reversed in part. The judgment of the circuit court is affirmed.

*Appeal from Multnomah County Circuit Court, John A. Wittmayer, Judge. 213 Or App 343, 161 P3d 319 (2007).

GILLETTE, J.

This is a class action wage and hour case in which plaintiffs, employees of hospitals owned by Legacy Health Systems, seek, among other things, compensation for required meal and rest breaks that they contend defendants did not provide them during work periods. Defendants⁽¹⁾ filed an ORCP 21 motion to dismiss various of plaintiffs' claims for relief on the ground that, although employees have a private right of action for unpaid wages, the applicable statute does not make that private right of action available for meal or rest period violations of the kind asserted by plaintiffs. The trial court agreed that the statute does not provide a private right of action for either type of violation; it granted defendants' motion to dismiss and denied plaintiffs leave to replead.⁽²⁾ Plaintiffs appealed to the Court of Appeals, which affirmed the trial court's ruling as to the alleged meal period violations, but reversed the trial court's ruling as to the alleged rest period violations. Gafur v. Legacy Good Samaritan Hospital, 213 Or App 343, 347-49, 161 P3d 319 (2007). Defendants sought review of that decision to the extent that it reinstates petitioners' claims for compensation for rest period violations.⁽³⁾ We allowed review and now reverse that part of the decision of the Court of Appeals.

Because this case comes to us on a motion to dismiss for failure to state a claim under ORCP 21 A(8),⁽⁴⁾ we accept as true all well-pleaded allegations of fact in the complaint and give plaintiffs the benefit of all favorable inferences that may be drawn from the facts alleged. Babick v. Oregon Arena Corp., 333 Or 401, 407, 40 P3d 1059 (2002). However, we disregard any

allegations that state conclusions of law. *See Nadeau v. Power Plant Engr. Co.*, 216 Or 12, 15, 337 P2d 313 (1959) (court disregards conclusions of law because they are nullities that do not present any issue). Respecting the rest period, plaintiffs alleged as follows:

"34. ORS 653.261 provides for minimum employment conditions to be established by the Commissioner of the Oregon Bureau of Labor and Industries. Defendants were required [to] provide [their] employees with a paid rest period of not less than ten * * * minutes for each period of four hours in which the employee worked, or worked the major part of the four hour period. OAR 839-020-0050.

"35. Defendants failed to provide Plaintiffs and all other similarly situated employees (Rest Period Class) members uninterrupted rest periods of not less than 10 minutes when and as required, in violation of ORS 653.261 and OAR 839-020-0050, and failed to pay Plaintiffs and similarly situated class members for those breaks not provided.

"36. As a result of Defendants' failure to provide uninterrupted rest periods as required, Plaintiffs and similarly affected class members are due wages for those rest periods which defendants failed to provide within the six year statute of limitations period."

The only factual allegations in the quoted portion of the complaint are (1) that defendant failed to provide plaintiffs with 10-minute rest breaks for every four hours that they worked, and (2) that defendant "failed to pay [p]laintiffs * * * for those breaks not provided." All of the remaining allegations are legal conclusions. In addition to the pleadings, the parties agree that plaintiffs were paid at the appropriate rate for four hours of work for each four-hour work period in which defendant did not provide them a rest break.

As noted, defendants moved to dismiss the rest period claims in the original complaint and the trial court granted the motion. Plaintiffs appealed that ruling to the Court of Appeals, arguing that (1) the applicable rule, OAR 839-020-0050(1)(b),⁽⁵⁾ entitles them to four hours pay for every three hours and 50 minutes worked and (2) because defendants failed to provide them the required 10-minute rest period, plaintiffs actually worked ten minutes in each four hour period for which they were not compensated. Plaintiffs argued, further, that, because compensation for work provided is "wages," as that word is defined in ORS 653.010(10), defendants necessarily paid plaintiffs less wages than they were owed. The Court of Appeals agreed, and reversed the contrary ruling of the trial court.

We turn first to an examination of the relevant statutes. As noted, this is a wage claim under ORS 653.055. That statute authorizes an employee who is not paid all the wages to which he is entitled to bring an action to recover those unpaid wages, plus penalties:

"(1) An employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

"(a) For the full amount of the wages, less the amount actually paid to the employee by the employer; and

"(b) For civil penalties provided in ORS 652.150."

"Wages" are defined elsewhere in the statutes as "compensation due to an employee by reason of employment." ORS 653.010(10). The word "employment" is not defined in the statutes, but the word "employ" means "to suffer or permit to work" (excluding voluntary or donated services). ORS 653.010(2). Under ORS 653.055, then, the extent to which an employee is "entitled" to wages depends on whether and for how long he or she was suffered or permitted to "work."

The inclusion of the reference to ORS 653.261 in section (1) of ORS 653.055 in connection with the phrase "the wages to which an employee is entitled" suggests that the legislature intended ORS 653.261 to confer on employees some kind of an entitlement to wages. ORS 653.261 provides:

"(1) The Commissioner of the Bureau of Labor and Industries may adopt rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. The rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of the employees when computed without benefit of commissions, overrides, spiffs and similar benefits.

"(2) Nothing contained in ORS 653.010 to 653.261 shall be construed to confer authority upon the commissioner to regulate the hours of employment of employees engaged in production, harvesting, packing, curing, canning, freezing or drying any variety of agricultural crops, livestock, poultry or fish.

"(3) Rules adopted by the commissioner pursuant to subsection (1) of this section do not apply to individuals employed by this state or a political subdivision or quasi-municipal corporation thereof if other provisions of law or collective bargaining agreements prescribe rules pertaining to conditions of employment referred to in subsection (1) of this section, including meal periods, rest periods, maximum hours of work and overtime.

"(4) Rules adopted by the commissioner pursuant to subsection (1) of this section regarding meal periods and rest periods do not apply to nurses who provide acute care in hospital settings if provisions of collective bargaining agreements entered into by the nurses prescribe rules concerning meal periods and rest periods."

The statute does not, by its terms, directly entitle employees to anything, much less wages. Rather, it authorizes the commissioner of the Bureau of Labor and Industries (BOLI) to promulgate rules "prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees," including, but not limited to, "minimum meal periods and rest periods, and maximum hours of work."

At the same time, section (1) of the statute contains two direct references to wages. The first reference is a prohibition: BOLI is forbidden to promulgate rules concerning minimum wages. ⁽⁶⁾ The second reference concerns overtime pay: "[A]fter 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of the employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

Defendants argue, at the outset, that the only wage claim that ORS 653.261 arguably authorizes is for overtime pay violations, because that is the only "wage" issue mentioned in the statute. ORS 653.261, they argue, does not and cannot authorize BOLI to promulgate rules that create wage claims for violations of minimum conditions of employment. That is so, in defendant's view, because the phrase "conditions of employment" necessarily deals with what employers may allow or require employees to do while they are working, and that is not a wage issue. One of the *amici* points out, relatedly, that the rest break reference in ORS 653.261 does not even require that rest breaks be paid, much less create an entitlement to additional wages for missed rest breaks. It follows, defendants assert, that, to the extent that OAR 839-020-0050 purports to create an entitlement to wages for rest break violations, it exceeds BOLI's statutory authority.

We need not decide whether defendants' point is correct. Assuming (without deciding) that BOLI has authority to create a wage entitlement for such violations, we conclude that BOLI did not do so in OAR 839-020-0050 with respect to required rest breaks.

To explain our point, we turn to an examination of OAR 839-020-0050, using the same interpretive framework with respect to administrative rules that we use with respect to statutes. See *Tye v. McFetridge*, 342 Or 61, 69, 149 P3d 1111 (2006) (in interpreting administrative rule, court's task is same as involved in determining meaning of statute: to discern meaning of words used, giving effect to intent of body that promulgated rule). We begin by considering the text of the rule itself, together with its context, which includes other provisions of the same rule, other related rules, the statute pursuant to which the rule was created, and other related statutes. *Id.* If the meaning of the rule is clear at that level, then further inquiry is unnecessary. *Id.*

OAR 839-020-0050(1)(b) provides, with respect to rest breaks:

"(1) Except as otherwise provided, every employer shall provide to each employee an appropriate meal period and an appropriate rest period.

"* * * * *

"(b) 'Appropriate rest period' means: A period of rest of not less than ten minutes for every segment of four hours or major part thereof worked in one work period without deduction from the employee's pay. The period of rest must be in addition to and taken separately from the time allowed for the usual meal period. Insofar as feasible, considering the nature and circumstances of the work, such period of rest is to be taken by an employee approximately in the middle of each four hour (or major part thereof) segment. The rest period is not to be added to the usual

meal period or deducted from the beginning or end of the work period to reduce the overall length of the total work period."

"(A) The provisions of section (1) of this rule regarding appropriate rest periods do not apply when all of the following conditions are met:

"(a) The employee is 18 years of age or older; and

"(b) The employee works less than five hours in any period of 16 continuous hours; and

"(c) The employee is working alone; and

"(d) The employee is employed in a retail or service establishment, *i.e.*, a place where goods and services are sold to the general public, not for resale; and

"(e) The employee is allowed to leave the employee's assigned station when the employee must use the restroom facilities.

"* * * * *

"(4) As used in this rule, 'work period' means the period between the time the employee begins work and the time the employee ends work, and includes rest periods, and any period of one hour or less (not designated as a meal period) during which the employee is relieved of all duties."

The Court of Appeals accepted plaintiffs' assertion that, because OAR 839-020-0050(1)(b) entitles employees to rest breaks "without deduction from the employee's pay," it necessarily follows that that provision entitles them to four hours' pay for three hours and 50 minutes of work. *Gafur*, 213 Or App at 349. That conclusion is unwarranted and, indeed, as we explain below, we think that the prohibition on deductions from pay cuts the other way. Certainly, nothing in that rule requires *additional* wages for missed rest breaks.

Underlying plaintiffs' assertion, and the Court of Appeals' conclusion, is the unspoken assumption that rest breaks are not "work." While that assumption might be valid in colloquial parlance, the text of the rule, its context, and related statutes demonstrate that "work" is a term of art for purposes of wage and hour laws, and it includes rest breaks. First, OAR 839-020-0050 itself defines a "work period" to include rest breaks:

"(4) As used in this rule, 'work period' means the period between the time the employee begins work and the time the employee ends work, *and includes rest periods*, and any period of one hour or less (not designated as a meal period) during which the employee is relieved of all duties."

(Emphasis added.) The fact that an employer may not deduct wages from the employee's pay for the rest break also supports the idea that employees are working during rest periods, even if they are not performing duties at that time.

If further confirmation were needed, the context of OAR 839-020-0050(1)(b) supplies it. Related regulations establish that employees are not required to be "working" (in the colloquial sense) the entire time that they are considered to be "working" for purposes of wage and hour laws. For example, OAR 839-020-0041, dealing with "waiting time," provides that employees who are required to "wait" as part of their jobs are considered to be working, so long as "the time spent waiting belongs to and is controlled by the employer and the employee is unable to use the time effectively for the employee's own purposes." OAR 839-020-0041(1). Similarly, an employee who is required to remain on-call on the employer's premises or so close thereto that the employee cannot use the time effectively for the employee's own purposes is "working" while on-call. OAR 839-020-0041(3). And, under OAR 839-020-0042(1), employees who are required to be on duty for less than 24 hours are considered to be working even though they are permitted to sleep or engage in other activities when not busy. By the same token, the fact that a 10-minute rest break is too short to enable an employee to use the time effectively for his or her own purposes suggests that the employee is "working" for purposes of the wage and hour laws. (7)

As discussed above, ORS 652.261 authorizes BOLI to issue rules prescribing "minimum conditions of employment * * * as may be necessary for the preservation of the health of employees." The part of OAR 839-020-0050 that deals with rest breaks is such a rule. It specifies that rest breaks should be taken by employees "approximately in the middle of each four hour" shift; they may not be added to meal periods or deducted from the beginning or end of work periods to reduce the overall length of the shift; and employees may not be docked pay for taking them. All of those features indicate that the rest break is intended to benefit the employees' physical and mental well-being. Other rules prescribing minimum conditions of employment prohibit employees from being required to lift excessive weights, OAR 839-020-0060, and require employers to provide a sanitary and safe work environment, with adequate lighting, ventilation, washrooms and toilet facilities, among other things. OAR 839-020-0065. Nothing in any of those "condition of employment" rules suggests any intention on BOLI's part to require employers to pay additional wages in the event of their violation. (8)

Having considered the text of ORS 653.055, ORS 653.261, and OAR 839-020-0050 in context, we conclude that an employee who takes a rest break does not stop working for wage and hour purposes. It follows that an employee who works four hours and takes a 10 minute rest break within that four-hour period "works" the same amount of time (for wages and hour purposes) as an employee who works four hours and does not take a rest break. In each circumstance, the employee is entitled to four hours pay and no more. See ORS 653.055(1) (providing wage claim for wages to which employee is "entitled"). Therefore, in this case, employees who were not provided rest breaks during a four-hour shift but were paid for four hours of work for that shift have not been paid "less than the wages to which the employee is entitled" under ORS 653.261 or OAR 839-020-0050(1)(b), and may not pursue a wage claim under ORS 653.055.

BOLI has filed an *amicus* brief in this court in which it argues that it intended, in promulgating OAR 839-020-0050(1)(b), to allow employees to collect wages for missed rest periods and that, properly interpreted, that is what the rule provides. Specifically, BOLI argues that the phrase "without deduction from the employee's pay" in the definition of a rest period in OAR 839-020-0050(1)(b) means that employees are entitled to four hours pay for three hours and 50 minutes of

work and that, consequently, an employee who has not been provided with a rest break can initiate a wage claim for the 10 minutes of services provided but not compensated. BOLI asserts, further, that that "interpretation" of the rule is plausible and, therefore, is entitled to deference by this court. *See Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994) (appellate court defers to agency's plausible interpretation of its own rule).

As BOLI goes on to recognize, however, this court defers to an agency's interpretation of its own rule only as long as that interpretation "cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law." *Id.* As is evident from the above discussion, we have concluded that BOLI's interpretation is inconsistent with the wording of the rule and its context.

In addition, we observe that nothing in BOLI's brief suggests that it has, in the past, "interpreted" OAR 839-020-0050(1)(b) in the way that it now espouses. It does not offer a past case or policy statement or any other evidence that it ever intended OAR 839-020-0050(1)(b) to have the meaning that it now advocates. In fact, BOLI acknowledges that it has never sought wages for employees who have missed rest periods; rather, it has always enforced the rule by seeking civil penalties against employers that have violated its provisions.

In essence, BOLI's argument in the present case amounts to no more than an assertion that the Court of Appeals opinion was correct. We do not view that as an interpretation to which we owe deference.

All of that is not to say that employees do not have any recourse for violations of the rest break requirements. ORS 653.256(1) authorizes BOLI to "assess a civil penalty not to exceed \$1000 against any person who willfully violates ORS * * * 653.261 or any rule adopted thereunder."⁽⁹⁾ In addition, BOLI has the authority to seek criminal prosecution of employers who violate the rest break requirements. *See* ORS 653.991 ("Violation of any provision of this section or ORS 653.010 to 653.545 or of any rule adopted by the Wage and Hour Commission under ORS 653.307 shall be punishable as a misdemeanor.").

Based on the foregoing, we think that it is clear from the text and context of controlling statutes and rules, and we therefore hold, that OAR 839-020-0050(1)(b) requires employers to provide minimum rest breaks but violation of that requirement does not give rise to a wage claim under ORS 653.055 for additional wages based on missed rest breaks. Accordingly, plaintiffs' allegations that defendants failed to provide them with rest breaks and failed to pay them "for those breaks not provided" would not, if true, establish that plaintiffs were paid "less than the wages to which [they were] entitled under * * * ORS 653.261." The trial court correctly dismissed plaintiffs' rest break claim for failure to state ultimate facts sufficient to state a claim. The contrary conclusion of the Court of Appeals was error.

The decision of the Court of Appeals is reversed in part. The judgment of the circuit court is affirmed.

1. Plaintiffs originally brought their action against several hospitals owned by Legacy Health Systems as well as Legacy Health Systems itself. The trial court dismissed all defendants except Legacy Meridian Park Hospital and Legacy Health Systems. Plaintiffs have not challenged that ruling.

2. Notwithstanding that the trial court did not give plaintiffs leave to replead, plaintiffs thereafter filed an amended complaint, asserting, among other things, breach of contract claims for missed meal and rest periods. The trial court dismissed those claims because plaintiffs did not have leave to replead them. The correctness of that ruling is not before us.

3. Plaintiffs have not challenged the part of the Court of Appeals decision affirming the trial court's ruling respecting the alleged meal period violations, and that matter also is not before this court.

4. ORCP 21 A provides:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * *

(8) failure to state ultimate facts sufficient to constitute a claim."

5. The text of OAR 839-020-0050(1)(b) is set out below, ____ Or at ____ (slip op at 7-8).

6. The legislature provides for minimum wages in ORS 653.025.

7. Under OAR 839-020-0004(20), all time that an employee necessarily must be on the employer's premises is considered "work":

"'Hours worked' means all hours for which an employee is employed by and required to give to the employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place * * *."

In fact, BOLI's own website states that employers may require employees to remain on the premises during rest breaks. *Breaks: Meal And Rest Period, Technical Assistance: FAQ,*

www.boli.state.or.us/BOLI/TA/T_FAQ_Restandmeal.shtm. Clearly, BOLI considers rest breaks to belong to and be controlled by the employer.

8. By contrast, OAR 839-020-0030 specifically provides that overtime wages must be paid. That rule provides that, subject to enumerated exceptions,

"all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1) * * *."

9. BOLI has promulgated rules expressly authorizing the assessment of civil penalties for meal and rest period violations. See OAR 839-020-1010(1)(j) and (l) (providing for such assessment). Further, OAR 839-020-1000 provides, "Each violation is a separate and distinct offense. In case of continuing violations, each day's continuance is a separate and distinct violation."

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

MOTION PRAECIPE

Notice is hereby given that Leigh Ann Collings Tift, of attorneys for defendant, has set a motion for hearing as follows:

Judge (or Pro Tem): **Hon. Jerome LaBarre**

Date: July 2, 2008 Time: 1:30 p.m. Room: 702

This is a ☒ first ☐ subsequent setting for this motion.

☐ moving party waives appearance ☒ reporting is requested (we will furnish our own court reporter for this hearing)

Length of time requested for this motion hearing: 30 minutes

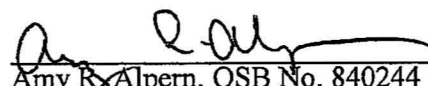
TYPE OF MOTION:

- ☐ ORCP 21 ☐ Prima Facie Default ☐ Set Aside Default
☐ Summary Judgment ☐ Compel Production ☐ Change Venue
☒ Other: Defendant's Motion for Partial Judgment on the Pleadings

I certify that I served a copy of this praecipe by facsimile transmission on the 22nd day of May, 2008, on the following:

Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683
Fax: 360-567-3331

Dated: May 22, 2008.


Amy R. Alpern, OSB No. 840244
Telephone (503) 221-0309

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5
6 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
7 **FOR THE COUNTY OF MULTNOMAH**

8 **MICHAEL MIGIS, et al.,**

Case No. 0711-13531

9
10 Plaintiff,

11 v.

**DECLARATION OF CHEY K.
POWELSON SUPPORTING
SUPPLEMENTAL BRIEFING ON
PLAINTIFF'S MOTION TO
ENFORCE COURT ORDER**

12 **AUTOZONE, INC.,**

13
14 Defendant.

15
16 I, Chey K. Powelson, hereby declare as follows:

- 17
18 1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter,
19 and base the contents of this declaration on my own personal knowledge and/or the
20 litigation files and documents my firm maintains for this litigation.
21
22 2. During a telephone conference with Defendant's counsel Leigh Ann Tift on May 8,
23 2008, I informed Ms. Tift that based on Defendant's non-production of what
24 appeared to be approximately 90 or so Termination Reports for those employees
25 listed on Defendant's Excel summary report, Plaintiff would have to seek additional
26 relief as set forth in Plaintiff's supplemental briefing relating to the *Motion to
Enforce Court Order*.

3. Upon information and belief, by the end of the day on April 23, 2008, Defendant had not produced approximately 114 Termination Reports (although since several employee identification numbers appear twice, this is not a precise count). By the end of the day on April 24, 2008, Defendant produced 17 additional Termination Reports, which still left more than 90 Termination Reports not produced under the Court's second Order.
4. Attached hereto as **Exhibit A** is a true and correct copy of Defendant counsel Neil Olsen's April 4, 2008 9:49 a.m. e-mail, with which he had attached the "summary report" in .pdf format. Defendant's counsel reasoned that since Plaintiff now had "all documents relating to items (2) and (3) from the Court's Order," such "obviates the hearing [on petition for expedited hearing to *Enforce Court Order*] [Plaintiff's counsel] have noted for 11:30 today."
5. Attached hereto as **Exhibit B** is a true and correct copy of a "print screen" (which I personally viewed being created in this law firm) of the summary report's Microsoft Excel "File Properties," indicating that the date of the document's creation appears to be April 2, 2008.
6. Attached hereto as **Exhibit C** is a true and correct copy of portions of the April 8, 2008 hearing transcript on Plaintiff's *Motion to Enforce Court Order*, and in which Defendant's counsel represented that the Termination Reports were "absolutely critical."
7. Attached hereto as **Exhibit D** is a true and correct copy of the Court's second Order relating to Plaintiff's *First Motion for Order Compelling Discovery*, and which includes the finding that "there was a lack of good faith compliance [by Defendant] with this Court's prior order * * *."

///

- 1 8. Attached hereto as **Exhibit E** is a true and correct copy of portions of the April 22,
2 2008 hearing transcript on Defendant's *Motion for Extension of Time*.
- 3 9. Attached hereto as **Exhibit F** is a true and correct copy of my April 28, 2008 letter
4 sent via e-mail (included) to Defendant's counsel Tift, requesting that Defendant
5 contact Plaintiff by May 2 as to whether Defendant would be producing additional
6 Termination Reports. By May 2, Defendant's counsel did not respond.
- 7 10. Attached hereto as **Exhibit G** is a true and correct copy of Plaintiff's April 10, 2008
8 ORCP 39C(6) Notice of Deposition to Defendant AutoZone, for which Plaintiff
9 sought AutoZone's testimony on the Excel summary report, including "the form and
10 content of those document(s) (e.g., identification and meaning of all fields, sources
11 of data found therein, and the definition of all PeopleSoft Action Codes)."
- 12 11. Attached hereto as **Exhibit H** is a true and correct copy of the Court's May 14, 2008
13 Case Management Order, establishing a deadline of August 15 for Plaintiff to file a
14 motion for class certification.
- 15 12. On May 16 during a telephone conference between myself, Plaintiff's counsel Bud
16 Bailey, Defendant's counsel Leigh Ann Tift, and Defendant's counsel Amy Alpern,
17 I asked Defendant's counsel whether they would re-designate someone from
18 AutoZone to give answers to the deposition questions previously answered with "I
19 don't know" the day before. Ms. Alpern declined by instead stating that the ORCP
20 39C(6) Notice of Deposition was too broad. At that point I directed Ms. Alpern to
21 ¶ 9 of the Notice (see **Exhibit G**, above), which explicitly sets forth issues related to
22 the Excel summary report.
- 23 13. During Plaintiff's May 15 ORCP 39C(6) deposition of AutoZone at which I was
24 personally present, to the best of my recollection, the AutoZone designee had
25 difficulty testifying as to the Excel summary report, including: the contents of that
26

document, the sources of the data found therein, and the definition of the "action codes" (termination reasons, including whether "quit with notice" meant quit with at least 48 hours notice). Also based on my recollection, AutoZone's May 15 ORCP 39C(6) designee testified he would need to look at additional documents or reports other than the underlying documents (e.g., the Termination Report) in order to definitively determine whether, for example, a person on the summary report was in fact paid timely. (To the extent the official deposition transcript differs from my recollection, after reviewing said transcript I will supplement this declaration.)

14. During the parties' in-person discovery conference on May 21, 2008, I asked Defendant's counsel to stipulate to the admissibility of the Excel summary report. Defendant's counsel would not stipulate. Defendant's counsel also at some point confirmed its position that all documents (that could be located) have been produced in response to the Court order(s), and stated that AutoZone stood by its denials (to Plaintiff's Requests For Admission).

15. Attached hereto as **Exhibit I** is a true and correct copy of excerpts from the August 2005 deposition of AutoZone manager Mark Dessem.

16. Attached hereto as **Exhibit J** is a true and correct copy of the portion of an AutoZone Handbook indicating that AutoZone paydays are every two (2) weeks.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated this 22nd day of May 2008 at Vancouver, Washington.


CHEY ROWELSON, OSB 03551
Attorney for Plaintiff

Exhibit A

Chey Powelson

From: Olsen, Neil N. [NOlsen@littler.com]
Sent: Friday, April 04, 2008 9:49 AM
To: Chey Powelson
Cc: Bud Bailey; Parker, Douglas S.; Tift, Leigh Ann C.
Subject: AutoZone/Migis
Follow Up Flag: Follow up
Flag Status: Red
Attachments: Autozone RRFP 1212 - 1219.pdf

Chey,

Please find attached documents responsive to the RFPs related to the First, Second, and Third RFAs from your first set of discovery requests.

You now have all documents relating to items (2) and (3) from the Court's Order on your motion to compel. I believe this obviates the hearing you have noted for 11:30 today.

I intend to forward you later today additional documents/responses relating to item (4) from the Court's Order.

Please let me know as soon as possible whether you still intend to appear at the 11:30 hearing. If so, please provide me a copy of your moving papers as we discussed yesterday evening.

Best regards,
Neil

Neil N. Olsen
 Littler Mendelson, P.C.
 1750 SW Harbor Way, Ste. 450
 Portland, OR 97201
 Main: 503.221.0309
 Direct: 503.889.8882
 Cell: 503.807.8505
 Fax: 503.242.2457
nolsen@littler.com

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Littler Mendelson, P.C.
<http://www.littler.com>

EXHIBIT A

Page 1

5/18/2008

Exhibit B

Microsoft Excel - Oregon terms 11.16.06 - 11.16.07.2

File Edit View Insert Format Tools Data Window Help

Net Pay

ID	Net Pay	Reason
100048	219.00	B3
101658	127.89	A1
101819	172.25	B3
101822	285.23	B3
101822	35.05	B3
102189	668.21	B3
102199	80.46	A1
102227	37.48	A5
102269	51.56	A1
102348	336.56	A1
102429	041.15	A6
102537	140.88	B3
102586	318.54	A1
102642	321.01	A1
102654	579.21	A1
102674	188.39	B3
102693	172.46	B3
102702	17.33	A1
102702	46.43	A1
102712	189.56	A1
102744	48.53	A3
102771	126.22	A5
102854	338.24	A1
102868	562.12	A1
102871	376.76	A5
102877	286.93	A6
10293280	1518.52	A1
10295533	218.70	A6
10295566	69.25	B3
10305167	405.47	OTH
10305420	246.79	A5
10308163	70.06	A1
10310068	681.85	TER
10310478	249.68	A1

Oregon terms 11.16.06 - 11.16.07.2 Properties

General Summary Statistics Contents Custom

Created: Wednesday, April 02, 2008 9:14:08 AM
 Modified: Wednesday, May 14, 2008 12:15:09 PM
 Accessed: Wednesday, May 14, 2008 12:15:10 PM
 Printed:

Last saved by: mdessem
 Revision number:
 Total editing time:

OK Cancel

Exhibit C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,)
and on behalf of all others)
similarly situated,)
Plaintiff,)
vs.) Case No. 0711-13531
AUTOZONE INC., A Nevada)
corporation,)
Defendants.)

BE IT REMEMBERED THAT on the 8th day of
April, 2008, the above-entitled matter came on for
hearing before the HONORABLE JEROME LaBARRE, Circuit
Court Judge.

DEBORAH L. COOK, RPR, CSR
COOK COURT REPORTING, INC.
1102 N. Springbrook Road
Suite 136
Newberg, Oregon 97132
(503) 537-0339
deb@cookcourtreporting.com

A P P E A R A N C E S

For the Plaintiff:

MR. A.E. BUD BAILEY

MR. CHEY POWELSON

Bailey Pinney & Associates

1498 SE Tech Center Place, #290

Vancouver Washington 98683

For the Defendant:

MR. NEIL OLSEN

Littler Mendelson

1750 SW Harbor Way, Ste. 450

Portland, Oregon 97201

ALSO PRESENT:

1 PROCEEDINGS

2 Tuesday, April 8, 2008 at 1:30 p.m.

3
4 THE COURT: Good afternoon. Please be
5 seated. We're here on Migis versus Auto Zone. This is
6 an expedited hearing on some very narrow and specific
7 matters. A lot of paper has been filed, a Court order
8 has been entered. It's axiomatic that the judges expect
9 Court orders to be complied with.

10 I am not going to allow what you may
11 normally think of as typical oral argument, because this
12 is coming to me in the matter of a few days' notice and
13 on an expedited basis.

14 So I have some very specific questions,
15 and, Mr. Parker, is that your name, sir?

16 MR. OLSEN: No, Your Honor, Mr. Olsen.

17 THE COURT: Mr. Olsen.

18 MR. OLSEN: Yes, Your Honor.

19 THE COURT: Mr. Olsen, this is my specific
20 question to start with, to you: Are you making a
21 representation now, and focusing on the Request for
22 Production of documents -- I don't want to refer to --
23 there's been a lot of paper filed concerning Requests
24 for Admissions, which I don't consider in front of me
25 right now on this expedited basis -- Request for

1 Production of documents, are you representing that all
2 documents within the possession, custody, or control of
3 your client and your law firm have already been
4 produced?

5 MR. OLSEN: Yes, Your Honor, all documents
6 that are responsive to the requests and subject of the
7 Court's orders stemming from the March 7th hearing have
8 been produced. And I think that we need to be careful
9 and pay particular attention to the language of their
10 requests, and how we responded to the requests.

11 THE COURT: How many different ways of
12 production took place?

13 MR. OLSEN: How many different ways of
14 production, Your Honor? I am sorry. I don't
15 understand.

16 THE COURT: Did all the production occur at
17 one time? Were two banker's boxes of documents
18 delivered on -- I understand that you did not make the
19 deadline. I understand you were late, but did
20 everything occur at once, or did it trickle in over half
21 dozen or a dozen different occasions?

22 MR. OLSEN: It did trickle in over several
23 occasions. As we would get documents into the office,
24 we would review them, see if they were responsive, or if
25 privileged information existed, or otherwise

1 nondiscoverable information existed. We would then
2 Bates number those documents and scan them in, and we
3 would send them by e-mail to plaintiff's counsel. We
4 were --

5 THE COURT: When was the most recent
6 production?

7 MR. OLSEN: The most recent production,
8 pursuant to the Court's order, was late in the day on
9 Friday, April 4th, which was a production of documents
10 within -- responsive to plaintiff's second set of
11 Requests for Production.

12 THE COURT: And there's nothing else out
13 there concerning what has been ordered and Court
14 ordered? Everything that exists has been produced?
15 There's nothing else to produce?

16 MR. OLSEN: Yes, Your Honor.

17 THE COURT: Thank you. Who is going to
18 speak for plaintiff?

19 MR. BAILEY: Thank you, Your Honor. Bud
20 Bailey.

21 THE COURT: You know, in the time I have
22 been on the bench, it's been fairly frequent that one
23 side says everything that we can produce has been
24 produced and everything that exists has been produced,
25 and the other says, yeah, but we want these other

1 kinds of records, like indicating the date of notice
2 which would then key the bookkeeping department to make
3 payments in a timely way, and cut-off employee benefits,
4 remove them from their medical insurance, if they have
5 such a thing.

6 I mean, what do you have -- you told me a
7 minute ago you have given everything. But Mr. Bailey
8 makes a pretty persuasive case that you couldn't have.

9 MR. OLSEN: Your Honor, if we step back for
10 a moment -- and I urged us all to specifically look at
11 the language of the requests, and counting 40 -- size of
12 requests, and limits the nature of the response in
13 certain occasions -- I am not trying to be cute here. I
14 am just trying to get down to it, to what we in good
15 faith read, and how we replied.

16 Whether you look at Request for Production
17 No. 1, or Request for Production No. 2, "Produce all
18 documents and electronically stored information for all
19 involuntarily terminated employees within the referenced
20 time period which defendant relies upon to support its
21 denial."

22 So here it is not all documents that exist
23 that are relevant to this set of given facts, but it's
24 all documents that exist that the defendant looks to in
25 fashioning a response to this set of facts that are set

1 forth in the Request for Admissions.

2 THE COURT: But this spreadsheet, which I
3 guess you did produce, this is like an in-house working
4 compilation document, which summarizes other documents.
5 It's really a report that was generated by the defendant
6 or defendant's counsel, isn't it? I mean it's --

7 MR. OLSEN: This is a document that is
8 indigenous to Auto Zone. It's not produced by
9 defendant's counsel. And, again, I would look to the
10 language of the requests. It's asking for production of
11 those documents that were looked to or relied upon.
12 It's not looking for every single document.

13 THE COURT: How is "documents" defined --

14 MR. OLSEN: Your Honor -- excuse me, Your
15 Honor. Go ahead.

16 THE COURT: I mean, because I am sure
17 there's a definition, and I bet it's not so narrow that
18 it just means this summary compilation.

19 MR. OLSEN: I agree if you were looking
20 exclusively at the definition of documents, that I would
21 agree. But, again, I would urge the Court to look at
22 this last phrase in the subject requests, "which
23 defendant relies upon to support its denial." So we're
24 not talking about every document that may be relevant to
25 this particular question, but if there is a document

1 that they are looking to to support the denial, then the
2 defendant produced that document.

3 If there are other documents that exist
4 relevant to those sets -- that set of facts, those
5 documents were not requested by the plaintiffs, Your
6 Honor, or the plaintiff.

7 THE COURT: Well, do you have all the other
8 documents available that essentially underpin this
9 spreadsheet that we have been just talking about, the
10 color coded one?

11 MR. OLSEN: That would require further
12 inquiry with the client to establish the existence of
13 such documents in kind and number.

14 THE COURT: You have done a lot of
15 employment case litigation, I assume?

16 MR. OLSEN: No, Your Honor, I have not.

17 THE COURT: It's my impression that maybe
18 not you, but there's been quite a bit of past Auto Zone
19 litigation. Bailey Pinney has been on the other side,
20 and I thought your firm was on the other side. I am
21 sure you have many lawyers.

22 MR. OLSEN: You are correct, Your Honor,
23 yes.

24 THE COURT: Well, typically what I have
25 seen over many years in employment litigation is there

1 cut the checks.

2 And what I have here is a situation where
3 the last date on here is, I am presuming, the last date
4 the employee worked, and that's filled in in the box.
5 Over here is the check date, that is the date that the
6 check was -- not given to the employee, but was actually
7 cut. In other words, they drafted a check on that day,
8 and that's the date that shows on the check.

9 So in the very first instance where the
10 employee was terminated, you guys checked 17 days after
11 the termination. They could not have denied our Request
12 for Admission using this document, because it admits the
13 Request for Admission. And unless there's some
14 underlying document upon -- which we haven't seen, that
15 someone else looked at and said, okay, I have this
16 document that says that 17 days didn't really exist.

17 With their admission, what I said earlier
18 is, this document -- I mean, what I would see is, I
19 would put this before the Court in some form of a motion
20 for class cert or summary judgment, and then I am going
21 to see a stack of documents like this that they are
22 going to rely on to refute their own document. And I
23 know that's going to be the case.

24 And my suspicion is because it's an Excel
25 spreadsheet, and having looked at documents produced by

1 this employer in multiple states, I can tell you, an
2 Excel spreadsheet is not a document that comes from
3 their computers. They use People Soft, and it would
4 have been a People Soft document, as the last pages
5 here, which are identified here as a People Soft
6 document. If you look at the top it says, People Soft
7 Action Codes on the back page of this when you look at
8 the action codes.

9 This is an Excel spreadsheet. This was
10 compiled by somebody. And, you know, strike me down if
11 I am wrong, I think this was compiled based upon other
12 information. We need the specific, actual Excel
13 spreadsheet in a narrative form, because we have asked
14 for it electronically, not in this form.

15 And then we can look at the document and
16 tell when they compiled it, what they used to compile
17 it. And essentially we should be able to tell who
18 compiled it. At the very least we should have gotten
19 the electronic format on this, if this is all there is
20 that existed.

21 THE COURT: This is my ruling. This
22 document that was produced, I have only the color coded
23 version of this, which has got a Bates number AZ/MIGIS
24 and the numbers 0001212. This document and the last
25 page has the same AZ/MIGIS and 0001219 -- the prior

1 order of the Court required underlying documents falling
2 within the definition of either Request for Production
3 on A of plaintiffs' first set of Requests for
4 Production, page 2, definitions A and B -- I do not find
5 it was a good faith production to simply produce this
6 compilation spreadsheet. The underlying documents need
7 to be produced. The underlying documents do need to
8 be -- there needs to be conferrals so the types of
9 matters that Mr. Bailey just referred to are produced.
10 And if there are extraneous documents that are not
11 important that will cause huge burden, I expect counsel
12 to work together.

13 But we are really past the time where
14 there's arguments -- and going both directions -- on
15 this production. This was ordered long ago. I would
16 have signed an order long ago. And, Mr. Bailey -- I
17 can't remember the name of your associate.

18 MR. BAILEY: Mr. Powelson.

19 MR. POWELSON: Powelson, sir -- I don't
20 have a name, actually.

21 THE COURT: We have so many people coming
22 every day in our Court, I am sorry, but I am just not
23 very good with names, Mr. Powelson.

24 There were defects that slowed down this
25 particular operation, Mr. Bailey and Mr. Powelson.

1 turnaround time.

2 But, Mr. Bailey, I do have sufficient
3 information, based on what I just said, to prepare an
4 order coming out of this. On the issue of sanctions,
5 that will have to be dealt with later. That's not an
6 expedited motion matter.

7 MR. OLSEN: If I may be heard, Your Honor,
8 for one moment. On the issue of good faith, I just want
9 to register an objection on that ground. You, Your
10 Honor, recognized that our reading of the particular
11 requests was a legitimate reading.

12 THE COURT: I don't agree with that,
13 Counsel. I think that is way overly narrow. I think
14 that represents gamesmanship. I don't know if that was
15 your client or you. I am not making a finding of
16 that --

17 MR. OLSEN: And, Your Honor, I did not
18 mention this, because I am not 100 percent sure on this
19 ground. And Mr. Bailey and Mr. Powelson may be more
20 familiar, and are more familiar with the Joarnt case,
21 which has been the subject of proceedings before Your
22 Honor.

23 But I believe in my recent review of
24 certain documents, there was a similar request in that
25 case -- and correct me if I am wrong, Counsel -- the

1 Court limited production to a summary of this nature.
2 And that may have been the source of "relied upon" in
3 producing such a summary spreadsheet to this Court. So
4 I just want to underscore --

5 THE COURT: Well, I don't know what that
6 case is, and whether there was an issue of
7 burdensomeness, because compilation -- and Rule 1001 in
8 the Oregon Evidence Code addresses compilations.
9 There's a reason and time and place for compilations.
10 What has been presented to me today, I don't agree that
11 in this case at this time and this place, this
12 compilation is sufficient production.

13 MR. OLSEN: Thank you, Your Honor. I just
14 want to underscore to the Court that I understand, we
15 understand that we have gotten off to a bit of a rocky
16 start, but we're going to make every effort to confer
17 with counsel and avoid these types of hearings before
18 Your Honor.

19 THE COURT: Good. Thank you.

20 MR. OLSEN: But I do -- I just want to
21 underscore that counsel for defendant and defendant have
22 operated in good faith, and they have endeavored to meet
23 the language of the request and comply with the Court's
24 order. And there's been no gamesmanship or deliberate
25 delay tactics on behalf of defendant, Your Honor.

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Page 33

1 STATE OF OREGON)

2)Ss.

3 COUNTY OF YAMHILL)

4

5 I, Deborah L. Cook, RPR, Certified Shorthand

6 Reporter in and for the State of Oregon, hereby

7 certify that at said time and place I reported in

8 stenotype all testimony adduced and other oral

9 proceedings had in the foregoing hearing; that

10 thereafter my notes were transcribed by computer-aided

11 transcription by me personally; and that the foregoing

12 transcript contains a full, true and correct record of

13 such testimony adduced and other oral proceedings had,

14 and of the whole thereof.

15 Witness my hand and seal at Dundee, Oregon,

16 this 21st day of May, 2008.



21

22

23

24

25

Deborah L. Cook
DEBORAH L. COOK, RPR

Certified Shorthand Reporter

OREGON CSR #04-0389

CALIFORNIA CSR #12886

WASHINGTON CSR #2992

EXHIBIT

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Page

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Exhibit D

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7 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
8 **FOR THE COUNTY OF MULTNOMAH**
9

10 **MICHAEL MIGIS**, individually and on behalf
11 of all others similarly situated,

12 Plaintiffs,


13 v.

14 **AUTOZONE, INC.**, a Foreign Corporation,

15 Defendant.
16

Case No. 0711-13531

**ORDER ON PLAINTIFF'S MOTION
TO ENFORCE COURT ORDER ON
PLAINTIFF'S FIRST MOTION FOR
AN ORDER COMPELLING
DISCOVERY**

on April 8, 2008 

17 **THIS MATTER** having come before the Court upon expedited hearing of *Plaintiff's*
18 *Motion to Enforce Court Order* as to document production only, and the Court having reviewed
19 the file, and being fully advised of the premise thereof:

20 **THE COURT HEREBY FINDS** there was a lack of good faith compliance with this
21 Court's prior order resulting from the parties' March 7, 2008 hearing on *Plaintiff's First Motion*
22 *for an Order Compelling Discovery, and Determining the Sufficiency of Defendant's Responses*
23 *to Plaintiff's Requests for Admission.*

24 **THE COURT HEREBY ORDERS** that Plaintiff's *Motion to Enforce Court Order* as
25 to document production is GRANTED. Within 15 calendar days after April 8, 2008, Defendant
26

1 must produce all documents required to be produced pursuant to this Court's prior Order, relating
2 to Plaintiff's First Set of Request for Production Nos. 2, 4 and 6.
3

4
5 SIGNED on this 28 day of April 2008.

6
7 /s/ Jerome LaBarre
8 THE HON. JEROME LABARRE
9 MULTNOMAH CO. CIRCUIT COURT

10 Submitted by:

11 BAILEY, PINNEY & ASSOCIATES, LLC

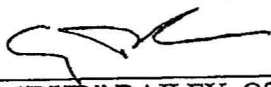
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22 Attorneys for Plaintiff
23
24
25
26

Exhibit E

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,)
and on behalf of all others)
similarly situated,)
Plaintiff,)
vs.) Case No. 0711-13531
AUTOZONE INC., A Nevada)
corporation,,)
Defendants.)

BE IT REMEMBERED THAT on the 22nd day of
April, 2008, the above-entitled matter came on for
hearing before the HONORABLE JEROME LaBARRE, Circuit
Court Judge.

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A P P E A R A N C E S

For the Plaintiff:

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MR. CHEY POWELSON

Bailey Pinney & Associates

1498 SE Tech Center Place, #290

Vancouver Washington 98683

For the Defendant:

MS. LEIGH ANN COLLINGS-TIFT

MS. AMY ALPERN

Littler Mendelson

1750 SW Harbor Way, Ste. 450

Portland, Oregon 97201

ALSO PRESENT:

PROCEEDINGS

Tuesday, April 22, 2008 at 1:30 p.m.

THE COURT: Please be seated in the back.

This is the time set on a expedited assignment of defendant's motion for extension of time on plaintiffs' discovery requests that were initially filed or dated in November of 2007. So I have reviewed the documents. And I also reviewed with interest the case in front of Judge Kantor. And are you Ms. Tift?

MS. ALPERN: Yes, I was going to do introductions. Have you met Ms. Tift?

MS. COLLINGS-TIFT: I am Ms. Tift, Your Honor.

THE COURT: You are Ms. Tift.

MS. ALPERN: I was here last week. I am with the Portland office of Littler Mendelson, so I came over with the motion on an expedited basis. I didn't think Ms. Tift was going to be here because she had a class certification in another courtroom. Turns out they got done, and here she is so you get both of us.

THE COURT: Yes, you were in front of Judge Kantor on what appears to be something very similar back in 2005. The transcript was attached. It appears that your firm, which holds itself out as having nationwide

1 expertise in employment litigation on the employer's
2 side, so you have known for a really long time how Auto
3 Zone keeps its records. And there was a problem in
4 front of Judge Kantor, and you were ordered to produce
5 the underlying documents to the spreadsheet, and it
6 looks like precisely the same problem arose in this
7 case, or has now become clear that is the problem. And
8 this relates back to production that should have been
9 done as early as January, perhaps, and so here we are in
10 late April.

11 So it doesn't look very good, Ms. Tift. So
12 tell me what you are asking for now, and why you think
13 it should be granted.

14 MS. COLLINGS-TIFT: First of all, the pay
15 records which were the subject of Judge Kantor's ruling
16 will be produced on time tomorrow. That's not the
17 problem. And the transcript that was provided is
18 somewhat misleading, because there's never been a
19 problem with that. The transcript that had to do with
20 the termination reports was not given to you. And that
21 is where the time problem arises.

22 The pay records are going to be produced on
23 time, Bates labeled, to Mr. Bailey. What we won't be
24 able to get to are the termination reports. And Auto
25 Zone keeps truly paperless personnel files. Any

1 personnel document that is generated by the company is
2 scanned in at Central Imaging in Memphis, and it's kept
3 in a .pdf file for that employee. In order to
4 retrieve -- you can't word search for .pdf files.

5 THE COURT: You knew that in November when
6 you received the Request for Production, didn't you?
7 That's what you told Judge Kantor in November of 2005.

8 MS. COLLINGS-TIFT: However, Judge
9 Bearden -- am I clear?

10 MS. ALPERN: Yeah, Presiding Court.

11 MS. COLLINGS-TIFT: -- allowed us to
12 provide the summary report originally. What you have
13 before you -- the transcript -- let me go back.

14 Auto Zone produced a summary exactly in the
15 same form that was produced in this case in the Joarnt
16 case. And Judge Bearden allowed that. There was -- if
17 you have the whole transcript before Judge Kantor, the
18 reason that we were there is they were asking to have us
19 held in contempt for not providing documents that had
20 been ordered by Judge Bearden.

21 And when you read through Judge Bearden's
22 transcript and the order that was prepared by
23 Mr. Bailey's firm, it's clear that what was discussed
24 was a summary. We produced a summary.

25 Now, after the summary was given to them

1 he -- I mean months after the summary was given, we were
2 asked to provide the underlying documents. One thing
3 that isn't mentioned, also, is the underlying documents.
4 As I explained to Judge Kantor, nothing in those pay
5 records is going to be any truer than the summary. He
6 said, give them over to them.

7 So what is not explained is because the
8 production requests were so exhaustive in Joarnt,
9 Mr. Bailey's firm was told they were likely going to
10 have to bear the cost.

11 What was never requested in Joarnt,
12 discussed but never ordered, was the termination
13 reports. And that's the problem here. This isn't a
14 do-over of the Joarnt case, and it's not the same thing
15 as was ordered by Judge Kantor. Those requests are
16 very, very burdensome. You literally have to print out
17 the personnel file, and then hand-search through it to
18 find a specific form.

19 THE COURT: When can you produce those?

20 MS. COLLINGS-TIFT: My client asked me to
21 ask you for three additional weeks.

22 THE COURT: How big is this class? How
23 many people does this concern?

24 MS. COLLINGS-TIFT: The class is enormous,
25 but this particular claim -- what we're talking about

1 now is a very specific claim having to do with late pay.
2 So what we're looking at right now are 200 employees who
3 terminated from Auto Zone in Oregon from November of '06
4 to November of '07.

5 THE COURT: Well, 200 employees is not that
6 large a group.

7 MS. COLLINGS-TIFT: Mr. Migis' personnel
8 file -- and I am not exaggerating -- is this thick. You
9 literally have to print it out as a .pdf, which takes a
10 long time because .pdf files don't print out.

11 THE COURT: But didn't you know as of
12 November that that is what --

13 MS. COLLINGS-TIFT: No.

14 THE COURT: Well --

15 MS. COLLINGS-TIFT: Termination reports
16 were never ordered in Joarnt, because it is an
17 incredibly burdensome request.

18 THE COURT: You know, burdensome has not
19 been advanced.

20 MS. COLLINGS-TIFT: Pardon?

21 THE COURT: I don't recall burdensome being
22 advanced in this context in front of me. This is what
23 the record seems to show. I keep on having different
24 lawyers from your firm show up at different times and
25 sign different documents, and at this point I really

1 want to deal with one lawyer. I want to deal with lead
2 trial counsel. Would that be you?

3 MS. COLLINGS-TIFT: It will be me, and
4 Ms. Alpern very likely. But you won't have that problem
5 again.

6 THE COURT: Well, I don't know if you know,
7 you probably have a lot of cases. But guess what? I
8 have a lot of cases, too. This matter came in front of
9 me first dealing with discovery on February 7, 2008.
10 You were not immunized from producing documents based
11 upon a motion for a temporary stay, which ended up being
12 denied, but I guess they weren't produced.

13 On March 7th I had another hearing in which
14 plaintiff had to move to compel for these documents. We
15 had a long discussion here in Court. Mr. Parker was
16 here, Mr. Olsen was here from your firm. I asked what a
17 reasonable period of time to produce the documents was,
18 and we were all referring to underlying documents then.
19 At least that was my understanding. And I was told 15
20 business days, which frankly is a long time, 15 business
21 days, particularly in this context, when this had
22 already been due in January. And I granted that.

23 And then I learned on April 8th, when we
24 had another hearing, that this short spreadsheet was
25 produced, and none of the underlying documents were

1 produced. And now you are telling me, like there's some
2 surprise, that there's a big problem producing it. But
3 meanwhile all of these months have gone by.

4 So it's -- you know, I have been looking at
5 document production in complex business litigation since
6 about 1970, so I have seen a lot of it in my time. And
7 this is one of the worst examples I can ever recall
8 seeing of what looks like stonewalling.

9 MS. COLLINGS-TIFT: May I offer something
10 here, please? I want you to understand something,
11 because when we do -- so okay. The summary sheet,
12 Mr. Bailey has referenced over and over again that the
13 summary sheet shows that people weren't paid their final
14 wages on time. It's absolutely critical to us, to Auto
15 Zone, to produce these records because what he is saying
16 doesn't actually hold up. We want to do this. We're
17 not stonewalling.

18 The only way to show that -- I will give
19 you a concrete example. Mr. Migis' last day -- I am not
20 certain how one pronounces his name -- his last day that
21 he worked was February 7th. On February 8th Mr. Migis
22 was scheduled to work, but didn't show up. And they
23 called him up to see where he was, to see why he hadn't
24 opened the store. And he said, "I am not coming in."

25 Now, the summary report shows that Migis